Supreme Court, U.S.
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No. 04-1115

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In The

Supreme Court of the United States

SEATTLE HOUSING AND
RESOURCE EFFORT (SHARE),

Petitioner,

v.

JOHN POTTER, Postmaster General of the
United States, and The United States Postal Service,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the United States Postal Service violate the First Amendment rights of the nation's homeless individuals, by restricting their mail delivery in each city to only one central location chosen by the Postal Service, at the same time as it provides housed individuals free mail delivery at their homes and/or neighborhood post offices?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties are listed in the caption. Plaintiff Carl Currier has withdrawn from this case, and, as explained in the brief, David Bar and Willard Johnson have been withdrawn due to counsel's inability to maintain contact with them.

Plaintiff SHARE is a private, nonprofit organization with no parent corporations or stock.

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OPINIONS BELOW

The opinion for which review is sought, *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004), is reproduced at Appendix 1-16. The divided United States Court of Appeals for the Ninth Circuit panel opinion affirmed the decision of the Honorable Robert S. Lasnik of the United States District Court for the Western District of Washington, reproduced as Appendix 21-30, and reported at *Currier v. Henderson*, 190 F. Supp. 2d 1221 (W.D. Wash. 2002). The decision of the United States Postal Court is reproduced as Appendix 33-41 and 42. These decisions are reported as *In re the Matter of the Petitions by Carl A. Currier, James Kerns and David Bar*, Postal Service Docket Nos. 00-209, 00-271, 00-272 (December 29, 2000) (consolidated) published at http://www.usps.com/judicial/2000deci/pob00-209-271-272id.htm and http://www.usps.com/judicial/2001deci/pob00-209forder.htm respectively.

STATEMENT OF JURISDICTION

On August 12, 2004, the United States Court of Appeals for the Ninth Circuit denied Petitioner's appeal of the dismissal of the case by the United States District Court for the Western District of Washington. On September 27, 2004, Petitioners petitioned for rehearing *en banc*. On November 17, 2004, the Ninth Circuit denied the petition for rehearing *en banc*. The Petitioner has 90 days from November 17, 2004 to file this petition. Petitioner requests certiorari under 28 U.S.C. § 1254(1) (2000) and U.S. Sup. Ct. R. 10(c).

CONSTITUTIONAL PROVISION, FEDERAL STATUTES AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." Appendix 82.

The federal statutes involved in this case are 39 U.S.C. § 403, reproduced at Appendix 85 and 39 U.S.C. § 101, reproduced at Appendix 83.

The federal regulations involved in this case are 39 C.F.R. § 3001, Subpart C, App. A, § 2027, reproduced at Appendix 76 and 39 C.F.R. § 958.9, reproduced at Appendix 77.

STATEMENT OF THE CASE

This is a proceeding against the United States Postal Service ("USPS" or "Postal Service") and the Postmaster General of the United States.

The issue concerns the adequacy of the Postal Service's policy regarding mail service to homeless individuals, under the United States Constitution and federal law. Homeless individuals are eligible for one form of free mail service: general delivery. General delivery service requires that the customer go to a post office counter or window and physically pick up their mail during post office business hours.

Under Postal Service policy, it will only provide general delivery mail service at one post office in each city or town, regardless of its population or geographic size or

where the general delivery customer resides in the city or town.[1] In compliance with this policy, the Postal Service currently provides general delivery services at only one location in the entire 84 square mile city of Seattle. This is equally true of all cities throughout the nation.

However, Seattle's homeless population is scattered throughout the city.[2] Homeless individuals who cannot access the Main Post Office during business hours have no access to their mail whatsoever. The Postal Service refuses to provide homeless individuals any alternative form of mail delivery without a fee. It will not provide a free post office box in lieu of mail delivery to homeless people even though it offers this service to other customers who are not eligible under postal regulations to receive home delivery. It will not allow homeless individuals to pick up their mail at their neighborhood post office, even though this exact service is offered to all non-homeless customers. It will not provide any alternative even though the lack of other alternatives denies mail service to thousands and perhaps millions of homeless Americans across the nation.

The individuals who originally brought this lawsuit are homeless and impoverished. They did not have mailing addresses. They resided within the city of Seattle. These mail customers have had problems receiving their mail at homeless shelters due to theft and the inability of shelters to provide adequate mail services.

Like all Americans, these mail customers are dependent on the mail to provide them with the most fundamental

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[1] Domestic Mail Manual D930 § 1.2, App. 170.

[2] Declaration of Daniel Malone, App. 149 at ¶ 10.

and basic of information, including information regarding medical services, veteran's benefits, bank statements, tax forms, voting registration materials, court documents, information on employment opportunities, letters from friends and loved ones and every other type of vital written communication.

The individual homeless plaintiffs sought access to their mail in several different ways. The Postal Service refused to provide them free access to their mail in any way other than general delivery service at the Main Post Office and then only during very limited business hours.

Dissatisfied with the Postal Service's refusal to provide them with accessible mail services, they appealed the denial of mail services to the Office of Administrative Hearings of the Postal Service. The Office of Administrative Hearings denied their appeals.

Therefore, on February 1, 2001, three homeless men, Carl Currier, Willard Johnson and David Bar, and a local homeless service provider and advocacy group, the Seattle Housing And Resource Effort ("SHARE"), filed suit against the United States Postal Service in the United States District Court for the Western District of Washington seeking declaratory and injunctive relief, damages and appealing the final agency action.[3] Plaintiffs subsequently filed a motion for class certification and for a preliminary injunction. The Postal Service filed a motion to dismiss pursuant to FRCP 12(b)(6). The District Court granted the Postal Service's motion to dismiss and denied Plaintiffs' motion for class certification as moot.[4] Plaintiffs then

[3] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1339 and 39 U.S.C. § 409(a).

[4] App. 55, 56, respectively.

sought appellate review in the United States Court of Appeals for the Ninth Circuit.[5]

On August 12, 2004, a split Ninth Circuit panel denied the appeal with the Honorable Ronald M. Gould dissenting in part and concurring in part.[6]

Carl Currier withdrew from the case, and the remaining plaintiffs petitioned for *en banc* review. On November 17, 2004, the petition for rehearing *en banc* was denied, with Judge Gould voting for review and the other two judges voting against it.

Plaintiff SHARE, a homeless advocacy group, continues to prosecute this appeal on behalf of the homeless people it serves, as well as the putative class of homeless individuals. Attorneys for the other plaintiffs, Willard Johnson and David Bar, have not been able to reach these homeless plaintiffs because they have no reliable mailing address. Consequently, Mr. Johnson and Mr. Bar have been dropped from this appeal.[7]

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[5] The U.S. Court of Appeals for the Ninth Circuit had jurisdiction under 28 U.S.C. § 1291 as the District Court rendered a final judgment on January 19, 2002.

[6] The decision is published as *Currier et al. v. Potter et al.*, 379 F.3d 716 (9th Cir. 2004). The case was initially argued and submitted on May 7, 2003. On May 28, 2003, the *Currier* panel withdrew submission in this case when this Court granted certiorari in *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004). *See United States Postal Service v. Flamingo Industries (USA) Ltd.*, 538 U.S. 1056 (2003). Following this Court's decision in *Flamingo*, the *Currier* panel ordered the parties to file supplemental briefs addressing the effect of *Flamingo*. The case was resubmitted on July 27, 2004.

[7] James Kerns, a petitioner in the initial appeal, was previously withdrawn for the same reason.

The plaintiff, SHARE, now seeks a writ of certiorari to this Court.

REASONS FOR GRANTING WRIT

A. This Case Involves An Important Question Of Federal Constitutional Law That Has Not Been Addressed Before By This Court.

1. Introduction

In ruling that the United States Postal Service violates neither the Constitution nor federal law through its policy of significantly limiting mail delivery to the homeless, a split panel of the United States Court of Appeals for the Ninth Circuit, "has decided an important question of federal law that has not been, but should be, settled by this Court . . . " U.S. Sup. Ct. R. 10(c).

The legal questions implicated, including the proper forum for First Amendment analysis and whether the United States mail system is a traditional, limited or nonpublic forum, are fundamental questions of federal law which will have ramifications far beyond this case. This Court has not yet directly addressed the issues presented here and the ultimate outcome regarding the legality of the policy will touch not only millions of individuals affected by this case, but many other future cases involving the Postal Service.

This Court should review the Court of Appeals' ruling in order to protect the integrity of the national mail system and to maintain the First Amendment rights of its users. If the Court of Appeals' ruling stands, it can, and will be used by the Postal Service and others to justify limitations on the use of the mails and to limit the First

Amendment rights of customers to use and participate in the mail system. Limitations on the use of a public forum such as the mail system are direct limitations on the exercise of First Amendment rights and are inconsistent with prior rulings of this Court in regards to the constitutional parameters of the national mail system and the fundamental purposes of the system as outlined by Congress.

As Judge Gould notes in his dissent, "[t]his unyielding policy unreasonably and substantially impairs the ability of some homeless persons to receive mail and to exercise their First Amendment rights," *Currier*, at 733 (Gould, J., dissenting in part), and results in an "egregious infringement of First Amendment rights." *Id.* at 737 (Gould, J., dissenting in part). Therefore, petitioners should be granted certiorari based on Rule 10(c).

Postal customers have both a federal statutory and a constitutional right to receive mail. *See* U.S. Const. amend. I; 39 U.S.C. §§ 101(a) and 403(a) and (b). The use and receipt of mail is a fundamental First Amendment right. *Bolger v. Youngs Products Corp.*, 463 U.S. 60, 69 n.18 (1983); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971).

The Postal Service has an obligation to provide universal mail delivery. The Postal Reorganization Act of 1970, 39 U.S.C. § 101(a) (2000), requires USPS to provide "all communities" and "patrons in all areas" with access to mail service.[8] This obligation extends even to extremely remote communities, such as those in the Alaskan bush country, and to customers who require extremely costly

[8] In 1998, Postmaster General Marvin Runyon declared that "[a]ll Americans are entitled to a free form of mail service." *No-Fee Post Office Box Eligibility* (Apr. 6, 1998). Reproduced at App. 151.

delivery alternatives. *"Complex" v. USPS*, 184 F.3d 827 (D.C. Cir. 1999). This obligation apparently even extends to people who choose to live on "mountaintops or behind yards stocked with ferocious dogs" for whom the Postal Service provides free post office boxes.[9]

Nonetheless, many homeless Americans still do not have access to a free form of mail delivery or, in many cases, to any mail delivery at all. Throughout the nation, the United States Postal Service currently provides only one type of free mail service to homeless individuals, "general delivery," at only one location in each city. In Seattle, the general delivery location is at the downtown Main Post Office, even though homeless people such as Mr. Johnson live in almost every neighborhood in the city. In his dissent, Judge Gould eloquently described the impact that these Postal Service policies have on homeless people wishing to access their mail:

> [W]ithout a physical address plaintiffs cannot, under Postal Service regulations obtain a post office box even for a fee. The homeless are left to depend on the Postal Service's general delivery service if they are ever to receive mail. And even though the City of Seattle covers eighty-four square miles, general delivery is now available only at the main post office in downtown Seattle during limited business hours. Moreover, the policy of providing general delivery service at only one location is applied without regard to where the recipients of general delivery mail might live,

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[9] Bravin, Jess, *Wytches Brouhaha: Demoness Ipek Clashes With Mark Warlokk: Issue Is Who Gets Their Mail; And It's Decided, as Ever, By an Obscure Postal Court*, Wall St. J. at A1 (July 20, 2001). Reproduced at App. 166.

> their financial status, or, perhaps most importantly, their ability to travel to the downtown post office during the hours that general delivery service is available.

Currier, at 734 (Gould, J., dissenting in part) (internal citations, quotations omitted). Judge Gould continued:

> Considering that the bulk of the population gets mail delivered to the front step of a home or in the lobby of an apartment building, it is unreasonable to burden homeless persons in all cases, regardless of their individual circumstances, with the task of taking public transportation for several miles at particular hours, during which they might be expected to be at work, if they are to pick up their mail. This concern is exacerbated by the problem that a long and hopeful journey to the main post office in many cases might greet the homeless with nothing but junk mail. These trips are ones that plaintiffs are bound to repeat every couple of days to avoid missing potentially important communication regarding government services. And in some cases, particularly those involving the disabled, there is not merely a grave burden but a practical impossibility for the homeless to reach the main office at required times to get mail.

Id. at 737. Judge Gould went on to explain that:

> In cases where general delivery service at the main post office is not a practicable venue, or comes only with undue burden, we should see that this effective denial of mail delivery is an egregious infringement of First Amendment rights, particularly when one considers that people who are homeless often do not have access to other important methods of communication such as the telephone or email. Contact through the

> mail system may be the only way that homeless people can be notified of potentially life-altering information or services such as the availability of public housing, receipt of veteran's benefits, or communications relating to other social services. And it may be the only way the homeless can keep in touch with a parent, a child, or a friend.

Id.

The plaintiffs asserted before the Ninth Circuit that the mail system as a whole, given its history and purpose as the primary method of communication in our country, was either a traditional public forum or, at a minimum, a limited public forum. Rather than analyzing the mail system as a whole, the majority of the panel splintered the analysis and limited its public forum analysis only to specific components of the system, general delivery and free post office boxes. The majority then found that these discrete components standing alone did not constitute public fora. *Currier*, at 727-28 & 731. Finally, the majority ruled that the Postal Service's policy was "reasonable," and viewpoint neutral, and that, as a regulation affecting a non-public forum, the Postal Service's policy did not, on its face, violate the Constitution. *Id.* at 730 & 731.

By contrast, Judge Gould correctly concluded that the forum analysis should be applied to the mail system as a whole, not merely to the limited general delivery or free post office box options:

> Plaintiffs challenge the general delivery service and the no-fee post office box not because the homeless plaintiffs want those specific services but because these services are potential means for plaintiffs to exercise their paramount right to receive mail despite their homelessness. For plaintiffs, seeking access to general delivery

> service, the no-fee post office box service, or any other service is the way to gain access to the mails system. It is access to the mail that is the relevant forum.

Id. at 735 (*internal citations omitted*).

Judge Gould then determined that the mail system is a public forum. He applied the time, place and manner review appropriate to challenges to limitations on First Amendment protected speech in public fora. Judge Gould determined that, while the Postal Service policy on its face did not violate the Constitution, "[i]n cases where general delivery service at the main post office is not a practicable venue, or comes only with undue burden, we should see that this effective denial of mail delivery is an *egregious infringement* of First Amendment rights." *Id.* at 737 (emphasis added).

This Court should grant certiorari to review the Ninth Circuit's decision because the majority has made no fewer than two serious errors in its ruling:

1. For the homeless, denial of general delivery is no different than full denial of the use of the mail system and thus, the proper forum was the entire "mail system." The majority erred in focusing on general delivery as a forum, without considering that this option was the only mail option available to homeless individuals; and
2. the majority then incorrectly determined general delivery mail service to be a nonpublic forum.

The majority's ruling conflicts with existing law, and unless reversed, will deny a class of millions of homeless and displaced Americans their right to receive mail. Because the panel decision affects the fundamental,

constitutionally-guaranteed right of access to the U.S. mail system – and is based upon an incorrect First Amendment analysis – the matter should be decided by this Court.

2. The United States Court Of Appeals For The Ninth Circuit Misapplied The Forum Analysis And Selected The Wrong Forum.

The *Currier* majority misconstrued the nature of the forum to which the plaintiffs are seeking access and then did not utilize the proper First Amendment forum analysis. The majority improperly limited its forum analysis to the general delivery option alone and did not appropriately identify the mail system itself as the proper forum. This determination led the court to then apply the least protective forum analysis that applied to "limited public" fora.

The majority erred by focusing too closely on components of mail delivery, as opposed to what the Plaintiffs were truly seeking – access to their mail. For the homeless, access to general delivery is equivalent to access to the mail system. The Postal Service will not deliver mail to the homeless and prohibits the homeless from obtaining post office boxes without a fee, even though no-fee mailboxes are provided to others who are ineligible for carrier delivery. The only way the Postal Service will provide a free form of mail delivery to the homeless is by general delivery. Thus, when the plaintiffs seek access to general delivery they seek access to their only portal to the mail system. Accordingly, a forum analysis that assumes that general delivery is simply one aspect of the postal system or one mode of available service misses the point. When the Court of Appeals did just that by limiting its public forum analysis, it erred.

This Court has identified three types of fora for purposes of First Amendment analysis: the traditional public forum, the public forum created by government designation (or limited public forum), and the nonpublic forum. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (charitable campaign rather than federal workplace was forum where plaintiffs sought to be listed in campaign). Accepted public fora have ranged from the traditional (streets and sidewalks,[10] and parks[11]) to the limited (university yearbooks[12] and bulletin boards,[13] and city hall display spaces[14]).

When the government restricts speech that takes place in a traditional or limited public forum, it must satisfy all parts of a three-part, time, place or manner test. *Perry Educational Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 45 (1983). Its restrictions must be content-neutral and narrowly tailored to serve a significant governmental interest. In addition, ample alternative forms of communication must remain available. *Id.*

By contrast, nonpublic fora include government properties that are "not compatible with general expressive activity."[15] The government may restrict speech within a nonpublic forum so long as the restriction is "reasonable

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[10] *Boos v. Barry*, 485 U.S. 312 (1988).

[11] *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002).

[12] *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001).

[13] *Giebel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001).

[14] *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir.), *cert. denied*, 534 U.S. 951 (2001).

[15] *Cornelius*, 473 U.S. at 819.

and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, at 46.

The majority provided only a cursory examination of what constituted the relevant forum for the purposes of this case. After a brief introduction to the topic, the majority wrote a mere two-sentence analysis, and then quoted only two cases in support. The majority came to the conclusion that, since "Currier seeks greater access to the general delivery mail system, contending that the service should be offered at branch post offices[,]" general delivery is the proper forum. *Currier*, at 727. The two cases relied on to support its determination that the forum at issue was simply the general delivery mail system and not the mail system as a whole were *Cornelius, supra* and *United States Postal Serv. v. Council of Greenburgh Civic Societies*, 453 U.S. 114 (1981). However, reliance on those two cases was misplaced.

The majority indicates that: "[w]e are mindful of the Supreme Court's admonition that, while the 'nature and function' of the system should not be ignored, courts should 'focus[ ] on the access sought by the speaker' and not the system in general." *Currier*, at 727 (quoting *Cornelius*, 473 U.S. at 801-02). However, the majority chose not to analyze or consider the clear "nature and function" of the mail system and instead quickly selected the most narrow and tangible fora possible, general delivery and post office box delivery. The majority's analysis is a misapplication of this Court's directives regarding forum selection.

Cornelius involved a First Amendment challenge to restrictions on a charitable campaign in a federal workplace. The petitioner argued that because the campaign took place in a federal workplace, the physical workplace should be the forum. This Court disagreed, reasoning that:

> [a]lthough petitioner is correct that as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on *the access sought by the speaker*.

Cornelius, at 801 (emphasis added). In *Cornelius*, the speaker sought access to the charitable campaign. Here plaintiffs seek access to their mail through any feasible and free means of delivery. Judge Gould's more in-depth analysis clarifies the nature of the access sought here.

> Simply stated, members of the homeless community want to receive their mail. This reflects nothing more, and nothing less, than a basic human need for communication. In feeling this need, the homeless stand on equal footing with others quartered more comfortably. Plaintiffs allege that there is currently no viable way of receiving mail on a regular and reliable basis. Plaintiffs challenge the general delivery service and the no-fee post office box not because the homeless plaintiffs want these specific services but because these services are potential means for plaintiffs to exercise their paramount right to receive mail despite their homelessness. *For plaintiffs, seeking access to general delivery service, the no-fee post office box service, or any other service is a way to gain access to the mail system.*

Currier, at 735 (Gould, J., dissenting in part) (emphasis added).

The Postal Service only delivers mail in four ways: 1) individual home delivery; 2) delivery to a set of mail boxes such as in an apartment building lobby or at a mobile

home park (another form of home delivery); 3) delivery to post office boxes located in a post office; and 4) general delivery. Homeless people, by definition, cannot get mail delivered to them at their homes. In addition, the Postal Service will not allow a homeless customer to obtain a post office box without a fee even though that exact service is provided to other customers who are ineligible for carrier delivery. *Id.* at 722.

The Plaintiffs therefore seek access to *any* kind of effective and free mail delivery, be it post office boxes, general delivery or any other appropriate means of delivery.[16] Plaintiffs merely seek access to the individual pieces of mail that *others have paid the defendant to deliver to them*. It is inconsequential how that delivery takes place, as long as delivery in fact takes place.

The majority's only other case used to support its forum selection analysis, *Greenburgh,* is inapposite. In *Greenburgh,* appellants sought to use the physical mailboxes to deliver unstamped materials to residents, an activity that neither used the United States mail system nor was, according to this Court, compatible with it. The statute at issue in *Greenburgh* prevented private citizens from depositing materials into individual letterboxes that had not been actually sent through the mail system. *Greenburgh*, 453 U.S. at 116. It did not in any way restrict the right of the citizens to use the mail system. *Id.* at 127. What plaintiffs sought in *Greenburgh*, physical access to the letterboxes, is nothing like what the Plaintiffs seek here, access to the mail that flows through the United

[16] Judge Gould lists a variety of other means by which the Postal Service could provide homeless people with real access to their mail. *Currier*, at 737 n.4 (Gould, J., dissenting in part).

Postal system in the course of its business. They wish to utilize the mail system in a manner in which it was intended to be utilized.

This Court has not addressed the United States mail system as a forum for communication since before its *Cornelius* decision. However, other precedent from this Court supports the Plaintiffs' contention that the mail system as a whole is the proper forum to analyze. This Court's most relevant decision involving a mail system and forum selection is *Perry, supra*. In *Perry*, a teacher's association argued that an interschool mail system was a limited public forum from which it could not be excluded. In that case, this Court chose the "school mail system" as the forum to which the plaintiffs sought access, rather than the individual teachers' mailboxes. *Perry,* 460 U.S. at 48. However, the *Currier* majority failed to follow the same rationale in its analysis, and thus departed from this Court's precedent. When the components of a forum are substantially similar and serve the same communicative purpose, this Court has defined the forum as the aggregate of the components.[17]

In contrast with Judge Gould's thorough analysis, the majority's unduly constrained forum analysis also clashes with the thorough reasoning of other circuits in forum-selection cases. Circuit courts considering First Amendment challenges to government-run programs that allow

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[17] *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality). In *Lehman*, the plaintiff challenged restrictions on a municipal bus advertising program. This Court chose to focus its inquiry on the advertising program itself, as the individual space was "a part of the commercial venture." *Id.* at 303. Nor did this Court focus its inquiry on the actual buses.

citizens to communicate a message define the relevant forum as the program itself, not the physical location where the communication takes place or even one component of the overall program. For example, in *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995), the Fifth Circuit held that, where the Ku Klux Klan sought access to an adopt-a-highway program, the relevant forum was the program, not the highway where the program actually took place. Likewise, Plaintiffs here seek access to their mail, not to the general delivery windows, post office boxes or even to the property on which post offices are situated.

Because Plaintiffs seek true access to mail delivery by any reasonably feasible means, the majority's narrow focus only on general delivery and post office box delivery is incorrect and contravenes Supreme Court precedent. Additionally, the analysis ignores the other proposed delivery alternatives and avoids the real issue before the court – whether the defendants can refuse to provide homeless people with a reasonable form of free mail delivery.

3. The Mail System As A Whole, As Well As General Delivery And Post Office Box Delivery, Are All Public Fora.

Because the majority chose the incorrect forum to analyze, it did not determine whether public mail service was a public forum. Had the majority properly determined that the mail system as a whole is the proper forum, it would have then been required to also determine that the mail system is a public forum. Restrictions on access to any public forum would have to survive strict scrutiny. *Perry*, 460 U.S. at 45.

Every court that has considered the issue has held the mail system to be a public forum.[18] It is difficult to conceive of a more public forum than our mail system. It exists for no other purpose than to facilitate the communication of ideas and information.

> Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.

Lamont v. Postmaster General, 381 U.S. 301, 305 n.3 (1965) (internal citations, quotations omitted).

In *Perry*, this Court indicated that even a school mail system opened up for use by the public would be a public forum.

> If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then [the education association] *could justifiably argue a public forum has been created.* This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal.

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[18] *Greenberg v. Bolger*, 497 F. Supp. 756, 776 (E.D.N.Y. 1980) (restrictions on access to preferred postal rate); *Shane v. Buck*, 658 F. Supp. 908, 916 (D. Utah 1985), *aff'd*, 817 F.2d 87 (10th Cir. 1987) (restrictions on private mail-forwarding service); *Spencer v. Herdesty*, 571 F. Supp. 444, 453 (S.D. Ohio 1983).

Perry, at 47 (emphasis added). If an open school mail system is a public forum, then the United States mail system and the general delivery system, neither of which require any permission to use, cannot be anything else.[19]

Unlike other traditional fora, the sole purpose of the mail system is to allow the communication of ideas. In *International Soc'y for Krishna Consciousness v. Lee (ISKCON)*, 505 U.S. 672 (1992) (Kennedy, J., Blackmun, J., Stevens, J., and Souter, J., concurring), four Justices of this Court pointed out that the "principal purpose" of streets and sidewalks, both traditional public fora, "is to facilitate transportation, not public discourse." The same Justices noted that parks, whose purpose "may be as much for beauty and open space as for discourse," are public fora. *Id.* at 697-98. Unlike streets, sidewalks or parks, the mail system, general delivery and post office box delivery have no other purpose. The Postal Service operates "public facilities designed to promote public communication." *Greenberg*, 497 F. Supp. at 776. It is the very paradigm of a governmentally-provided "public forum."

In his dissent, Judge Gould likewise found the mails to be "at least a limited public forum." *Currier*, at 735 n.1

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[19] Judge Gould came to the same conclusion regarding *Perry*:

> The Supreme Court's conclusion in *Perry* was based on the fact that the plaintiffs were not among the class of people specifically permitted by the school to use the forum and were unlike the class of people who were allowed to use the forum. 460 U.S. at 47-48. Here, by contrast, the mail system is open to the public at large and plaintiffs do not fall outside of the operating bounds of the mail system.

Currier, at 735 n.2 (Gould, J., dissenting in part).

(Gould, J., dissenting in part). Gould noted that, "[b]ecause the mail system is a 'channel of communication' created by the government 'for use by the public at large for assembly and speech' it can properly be characterized as a public forum." *Id.* at 735 (quoting *Cornelius*, 473 U.S. at 802).

Because the *Currier* majority mistakenly limited its forum analysis to general delivery and post office boxes, it inappropriately avoided the question of whether the mail system was a public forum. However, the majority erred further when it determined that neither general delivery nor post office box delivery were public fora. Both options, like the mail system generally, were created for no other purpose than "encouraging a diversity of views from private speakers." *Currier*, at 729 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995)). Their purpose is to allow private speakers to receive mail, a "fundamental aspect of the freedom of speech secured by the First Amendment." *Currier*, at 733 (Gould, J., dissenting in part). In *Greenberg v. Bolger,* 497 F. Supp. 756, 776 (E.D.N.Y. 1980) (restrictions on access to preferred postal rate), the Court found that both "the mail system in general, and the discounted postal rates in particular" were public fora. They were both "public facilities designed to promote public communication." *Id.* Like discounted postal rates, general delivery and post office box delivery are simply another mode of public communication to which strict scrutiny analysis is warranted. General delivery requires no permission to use a critical factor that this Court, in *Perry*, used to distinguish public from non-public fora. No proof of transience is required for either. General delivery service and, for some, post office box delivery are free. Both delivery systems,

while perhaps not as historically engrained as the mails in general, and while currently limited by time and location, are public fora open to the general public.

4. The Postal Service Regulations Cannot Survive The Strict Scrutiny Analysis Applied To Limitations On Speech In Public Fora.

Because the postal system as a whole is both the proper forum and a public forum, the defendants' restrictions to access to that forum must survive strict scrutiny analysis. They cannot do so. They are not narrowly tailored to serve a significant governmental purpose and they do not leave open any ample alternative channel of communication for homeless people denied access to their mail.

a. The Postal Service's Policies Regarding Delivery Of Mail To The Homeless Are Not Narrowly Tailored.

As one federal district court observed, in *Shane v. Buck*, 658 F. Supp. 908, 916 (D. Utah 1985), *aff'd*, 817 F.2d 87 (10th Cir. 1987) (considering the restrictions of a Postal Service regulation on First Amendment rights), restrictions on the mail system, a public forum, must be narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

In *Shane*, the court upheld a Postal Service requirement that customers of a mail forwarding service fill out a Postal Service form. The court found that requiring a user of a commercial mail forwarding service to fill out a form placed a minimal burden on the users' receipt of the mail and hence on his or her freedom of speech. The regulation

was narrowly drawn, requiring that only users of mail-forwarding services, not all customers, fill out the forms. The form itself asked for limited information related to the identity of the customer. The *Shane* court found the regulation crucial to the government purpose of insuring accurate mail delivery and preventing illegal use of the mail, a factor inherent specifically to mail-forwarding services which are susceptible to use in criminal and other improper schemes.

None of the mitigating factors present in *Shane* are present here. General delivery is a restricted service that is inferior to carrier delivery service and post office box service. Homeless persons who use general delivery service in Seattle are not required to simply fill out a form. They must pay a significant amount of their monthly income in transportation costs in order to receive mail. They must also spend time traveling to and from many areas of the city to the Main Post Office in order to receive mail and then can only receive it during limited hours. The policy of providing general delivery service at one post office is broadly drawn to apply to all general delivery recipients in Seattle without exception and regardless of where they may live, their financial status or their ability to get to the downtown post office during the hours that general delivery service is available or at all.

b. The Current Policies Regarding Delivery Of Mail To The Homeless Do Not Serve A Significant Government Interest.

The Postal Service's stated interests in substantially curtailing mail service to the homeless are neither

well-founded nor significant, especially in light of three considerations.[20]

First, the Post Office already provides an equivalent service to one of the alternative delivery options suggested by the plaintiffs – general delivery services at neighborhood post office – to all non-homeless customers. These customers may ask for their mail to be held for pickup at neighborhood post offices at any time and for any reason.[21] This service already requires the hand-sorting of mail in each post office and personal attention from post office employees.

Ironically, the same reasons given by prisons to explain less onerous restrictions on prisoners' mail service have been consistently and soundly rejected by the Ninth Circuit. Despite the fact that prisoners' receipt of mail is subject to "substantial limitations and restrictions in order to allow prison officials to achieve legitimate correctional goals and maintain institutional security[,]" *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990), the Ninth Circuit has recently struck down three separate restrictions on prisoners' receipt of mail, *under a rational basis review standard.*

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[20] The District Court and the Court of Appeals panel accepted the assertions of the Postal Service regarding its budget and efficiency rationales for these policies without requiring significant factual development because of the limited scrutiny applied. At the very least, the plaintiffs are entitled to a more thorough judicial examination in order to determine whether the proffered rationalizations are based in fact or are instead mere pretext that do not justify prohibiting desperately needy people from receiving the most basic and vital information.

[21] 39 C.F.R. § 3001, Subpart C, App. A, § 2027, App. 76.

In all three cases, the prisons argued that considerations of efficiency, staff and safety justified the bans on non first-class mail. All three times, the Ninth Circuit found that those contentions were not rationally related to the government's interests, and found the bans unconstitutional under the First Amendment. For example, in *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001) (prohibition on delivery to prisoners of bulk rate, third, and fourth class mail), the Ninth Circuit held that protecting the use of staff time cannot justify an "effective ban on" a person's right to access mail (even non-profit subscription publications).[22] The cases of *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001) (prison ban on delivery of prepaid, for-profit, subscription publications to prisoners is unconstitutional), and *Prison Legal News v. Lehman*, No. 04-35185, 2005 U.S. App. LEXIS 1556 (9th Cir. February 1, 2005) (Washington state prison's ban on non-subscription bulk mail and catalogs is unconstitutional), further underscore the point that, due to the majority opinion in *Currier*, prisoners have far more ability to receive non first-class mail while incarcerated than the homeless do to receive even first-class mail through the postal system, a fundamental Constitutional right.

Second, the Postal Service has not explained why providing more limited mail service to the homeless than to those with homes would affect, prevent or stop the use of the mail system for criminal or fraudulent purposes. Nor does this policy insure or enhance the accurate delivery of mail. General delivery of mail properly addressed to

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[22] *Morrison v. Hall*, 261 F.3d 896, 903 (9th Cir. 2001) (citing *Prison Legal News*, 238 F.3d at 1151).

any local post office would be as accurately delivered as general delivery mail addressed to the Main Post Office.

Third, as stated above in the introduction, the Postal Service's Constitutional and statutory obligation to provide universal mail delivery to all Americans trumps all of these considerations.

> The most important difference is that [the Postal Service] does not seek profits, but only to break even, 39 U.S.C. § 3621, which is consistent with its public character. It also has *broader obligations, including the provision of universal mail delivery*, the provision of free mail delivery to the certain classes of persons, §§ 3201-3405, and, most recently, increased public responsibilities related to national security.

Flamingo, *supra*, 540 U.S at 747 (emphasis added); *see also*, *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 527 (1991) (Postal Service has "responsibility to provide service to all communities at a uniform rate . . ."). This obligation to provide mail delivery services to all Americans outweighs the Postal Service's business considerations. *Milner v. Bolger*, 546 F. Supp. 375, 379 (E.D. Cal. 1982).

In fact, in other instances the Post Office itself has recognized this basic obligation. In 1998 the Postal Service was ready, willing and able to assume a cost of $8 to $13 million to stop its "inequitable treatment" of some customers who were eligible for no-fee post office boxes. There, it greatly expanded the definition of who was eligible for no-fee post office boxes to include people who lived *within* a quarter-mile of the local post office. App. 151. The cost of providing such boxes in 1998 was not viewed by the Postal Service as a significant enough justification to support its "inequitable treatment" of some customers who were then

ineligible for carrier delivery service. Likewise, such costs are not significant governmental interests here.

c. The Current Policies Regarding Delivery Of Mail To The Homeless Do Not Leave Open Ample Alternative Channels Of Communication.

As Judge Gould explained, under the Postal Service policy, the homeless are left without any options for receiving mail.

> Because the plaintiffs are homeless, the mail service is the only means for them to receive notification of governmental benefits such as veteran's benefits or public housing opportunities. Lacking a physical address, plaintiffs cannot avail themselves of other services offered by the Postal Service, such as obtaining a post office box even for a fee. And, though some homeless shelters and service centers provide mail service, such services are limited and often unreliable.

Currier, at 736 (Gould, J., dissenting in part).

The Postal Service has been granted a "state-conferred" monopoly to provide "universal mail delivery[.]" *Flamingo*, 540 U.S. at 747. Customers denied mail service have no other viable, alternative means to receive written documentation from the government, employers, or family and friends. Because of the Postal Service's exceptionally restrictive policy, homeless individuals have no alternative channels available to receive mail.[23]

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[23] The *Shane* court also noted that the regulation also left open ample alternative channels of communication for customers because they could still receive mail at a post office box or by home delivery. Obviously, neither option is available to the homeless here.

The homeless customers do not have homes where they can receive carrier delivery. For most homeless persons, even if post office boxes were available, they would be unaffordable or require sacrificing other basic needs.[24] Homeless shelters and service centers often do not provide mail services or may severely restrict the type of mail that will be accepted and the manner in which it will be turned over to the individual recipient.

The majority's decision has left homeless people without a way to exercise their paramount right to receive mail, a right which is of particular importance to them.

B. Because Of The Unique Importance Of Mail To All Homeless Individuals, This Court's Intervention Is Critical.

Access to mail services is a bedrock constitutionally-guaranteed right of all Americans. It is the conduit by which citizens correspond between themselves and with their government. Denial of access to this system severely threatens an individual's ability to exercise other constitutionally protected freedoms. Without mail, a person may be unable to receive voter registration materials, information from the courts, or information regarding government benefits to which the person is entitled. Mail provides a vital connection for many people to family and friends which cannot be replicated by any other means of communication.

Because of their limited access to other means of communication, homeless people feel the denial of mail

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[24] First declaration of Currier, App. 93 at ¶ 6, Declaration of Bar, App. 96 at ¶ 9.

especially acutely. As the GAO recently reported to Congress, because homeless people are "more likely to lack a reliable mailing address" they are often hindered from getting assistance in mainstream employment, housing and financial assistance programs.[25] Homeless individuals depend on mail service as the exclusive means by which they can be contacted by employers, doctors, attorneys, and loved ones. Without access to postal services a homeless person may be unable to vote, to maintain family contacts and to participate in society in general. The harm homeless people suffer due to the deprivation of mail service is unique and significant.[26]

The majority suggests that an "as applied" challenge to the Postal Service's restrictive policies may be available even after its opinion. *Currier*, at 730 n.1. Unfortunately, given that the majority already found that "the confinement of general delivery to a single Seattle location is reasonable,"[27] the effect of the majority's imposition of rational basis review due to its inadequate public forum analysis may render such a challenge nearly impossible in any future suit brought on that basis. In addition, the

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[25] *Homelessness: Barriers to Using Mainstream Programs* pp. 8-9 (GAO July 2000). App. 159-63.

[26] *See* Declarations of Bob Santos, App. 129-41; Christopher Murray, App. 98-123; Kathy Roseth, App. 142-45; and the Second Declaration of Carl Currier, App. 124-28. The difficulty that plaintiffs' counsel has had in maintaining contact with the individual named plaintiffs in this case is a classic example of the harm homeless people suffer because of the lack of reliable mail services. Absent reliable mail service, Plaintiffs' counsel have no reliable means of contacting the individual homeless clients. By restricting these individuals' access to their mail, the Postal Service has compromised the ability of legal counsel in this action to represent the interests of the named individual plaintiffs.

[27] *Currier*, at 730.

Postal Service policy violates not just the rights of those individuals for whom there is a particular or unique limitation. The policy violates the constitutionally guaranteed rights of all homeless people.

CONCLUSION

The majority's decision has resulted in the continued denial of mail services to millions of homeless individuals in Seattle and throughout our nation. As Judge Gould pointed out, the current provision of mail services to the homeless "unreasonably and substantially"[28] interferes with homeless individuals' right to receive mail. This Court should grant certiorari to prevent this "egregious" denial of a vital constitutionally protected right, reasonable and free access to the mail system.[29]

Respectfully submitted this 15th day of February, 2005.

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[28] *Id.* at 733 (Gould, J., dissenting).

[29] *Id.* at 737.

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APPENDIX A

CARL A. *CURRIER*; DAVID BAR; WILLARD JOHNSON; SEATTLE HOUSING AND RESOURCE EFFORT, a Washington non-profit corporation, individually and on behalf of others similarly situated, Plaintiffs-Appellants, v. JOHN E. *POTTER*,* Postmaster General of the United States, individually and in his official capacity; DALE E. ZINSER, Seattle District Manager of the United States Postal Service, individually and in his official capacity; UNITED STATES POSTAL SERVICE, Defendants-Appellees.

***Pursuant to Fed. R. App. P. 43(c)(2), John E. *Potter* is substittued for his predecessor, William J. Henderson.**

No. 02-35232

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

379 F.3d 716; 2004 U.S. App. LEXIS 16614

May 7, 2003, Argued and Submitted; May 28, 2003, Submission withdrawn; July 27, 2004, Resubmitted, Seattle, Washington**

****The panel withdrew submission in this case when the United States Supreme Court granted certiorari in United States Postal Service v. Flamingo Industries (USA) Ltd. on May 27, 2003, 538 U.S. 1056. Following the Court's decision on February 25, 2004, 124 S. Ct. 1321, the panel ordered the parties on March 16, 2004, to file supplemental briefs addressing the effect of Flamingo.**

August 12, 2004, Filed

COUNSEL: David Girard and Casey Trupin (argued), Seattle, Washington, for the plaintiffs-appellants.

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Caroline M. Brown and Thomas W. Beimers, Washington, D.C.; Maria Foscarinis, Pallavi Rai, and Jeremy Rosen, Washington, D.C., for amicus curiae National Law Center on Homelessness & Poverty in support of the plaintiffs-appellants.

JUDGES: Before: Diarmuid F. O'Scannlain, Ronald M. Gould, Circuit Judges, and Susan R. Bolton,*** District Judge. Opinion by Judge O'Scannlain; Partial Concurrence and Partial Dissent by Judge Gould

OPINION BY: O'SCANNLAIN

OPINION: O'SCANNLAIN, Circuit Judge:

We must decide various regulatory, statutory, and constitutional challenges to United States Postal Service policies regarding general delivery mail service and the provision of no-fee postal boxes to homeless persons.

I

Carl Currier, David Bar, and Willard Johnson are homeless persons in Seattle, Washington. Lacking physical

*** The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

addresses, they have found it difficult to receive mail. Although some homeless shelters will accept mail on behalf of residents, they will only hold mail for a limited time and mail theft in shelters is a recurring problem.

In May and June 2000, they inquired about three United States Postal Service (the "Postal Service") services: postal box rental, no-fee postal boxes, and general delivery. Under then-existing postal regulations, a person lacking a physical address who sought to rent a postal box had to provide a driver's license or a verifiable point of contact (such as a homeless shelter), or, alternatively, had to be known personally by the postmaster or box clerk. *See* Postal Bulletin 21877 at 7 (Sept. 29, 1994).[1]

No-fee postal boxes are available to customers who are ineligible for carrier delivery service. *See* Domestic Mail Manual D910.5.1(a) (Issue 55, Jan. 10, 2000).[2] For example, the Postal Service need not provide carrier services if an area has a low population density or a customer lives within a quarter-mile of a rural post office. No-fee boxes are unavailable in large cities such as Seattle because the Postal Service delivers mail to all physical addresses in the area.

General delivery service permits a person to receive mail addressed merely to his or her name, with the designation "General Delivery, [City Name]." In large cities

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[1] The regulation has since been changed to require an applicant to have a verifiable point of contact even if he or she provides proper identification or is known to the postmaster or box clerk. *See* Postal Bulletin 22060 at 89 (Oct. 4, 2001).

[2] The regulation has since been changed to require the customer seeking a no-fee box to have a physical address. *See* Domestic Mail Manual D910.5.2 (Issue 57, June 30, 2002).

with multiple branches, all general delivery mail is sent to one designated facility – in Seattle, the Main Post Office downtown. *See id.* M930.1.2 (Issue 57, June 30, 2002). The mail is held for pickup at a designated post office for thirty days. General delivery service is intended primarily to serve as a temporary means of delivery, although homeless persons may use the service indefinitely. *See id.* D930.1.1 (Issue 57, June 30, 2002);

These homeless persons experienced various difficulties when they attempted to take advantage of these services. The Postal Service denied Bar and Currier's request for postal box rental because they lacked physical addresses. Even after Currier submitted an identification card issued by a homeless shelter, he was still not permitted to rent a box. Johnson was allowed to rent a box after providing his driver's license. They were all told that they were ineligible for no-fee postal boxes and that they could receive general delivery service only at the Main Post Office.

Aided by a homeless-advocacy group, Seattle Housing and Resource Effort ("SHARE"), Currier, Bar, and a third homeless person, James Kerns (not a party to this appeal), filed petitions with the Postal Service challenging the denial of these services. An Administrative Law Judge ("ALJ") held that under the governing postal regulations they were properly denied no-fee boxes and that the Postal Service was not required to provide general delivery at locations other than the Main Post Office in downtown Seattle. The ALJ also denied Currier's petition for postal box rental because Currier refused to use the address listed on his identification card as a point of contact and the card itself lacked a signature as required by postal regulations.

The ALJ's decision became the final administrative decision when Currier failed to appeal it within the Postal Service.

Currier, Bar, and Johnson (hereinafter collectively "Currier") then brought suit against the Postal Service and former and current postal officials in the Western District of Washington.[3] Currier alleged violations of certain postal regulations;[4] the Postal Reorganization Act ("PRA"), 39 U.S.C. § 101 *et seq.*; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706; the First Amendment's Free Speech Clause; and the Fifth Amendment's Due Process Clause (incorporating the Fourteenth Amendment's Equal Protection Clause), and sought monetary damages as well as declaratory and injunctive relief.

The Postal Service moved to dismiss the action for lack of subject-matter jurisdiction and for failure to state a claim. Currier in turn filed motions for a preliminary injunction and class certification. The district court granted the Service's motion to dismiss and denied Currier's motions as moot. Currier timely appealed.

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[3] The district court dismissed the suit against the postal officers, *see Currier v. Henderson*, 190 F. Supp. 2d 1221, 1225 (W.D. Wash. 2002), and Currier does not appeal from that decision.

[4] Specifically, Currier alleged that the Postal Service failed to comply with its no-fee postal box regulation, *see* Domestic Mail Manual D910.5.1(a) (Issue 55, Jan. 10, 2000), and its postal box rental regulation, *see* Postal Bulletin 21877 at 7 (Sept. 29, 1994). On appeal, Currier only briefed the former claim, and his counsel conceded at oral argument that Currier no longer advanced the latter claim, which we therefore deem waived. *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004).

II

We first examine some complex jurisdictional issues, including whether sovereign immunity has been waived by the government and to what extent judicial review of administrative action may be available at all.

The district court held that "there is no waiver of immunity, no substantive legal basis and no jurisdiction over claims asserted under Postal Service regulations." *Currier v. Henderson,* 190 F. Supp. 2d 1221, 1227 (W.D. Wash. 2002). The court also dismissed the claims brought under the APA, explaining that the PRA exempted the Postal Service from APA review. *Id.* at 1228.

A

Currier contends that the district court erred in concluding that the Postal Service was entitled to sovereign immunity and that it lacked subject-matter jurisdiction over the Service's alleged violation of the no-fee box regulation. The Postal Service responds by arguing that Currier possesses no private right of action to challenge postal regulations, as required by the Supreme Court's recent decision in *United States Postal Service v. Flamingo Industries (USA) Ltd.,* 540 U.S. 736, 158 L. Ed. 2d 19, 124 S. Ct. 1321 (2004).[5]

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[5] The Service alternatively characterizes Currier's regulatory claim as a challenge implicating postal rates and classifications on a national scale, which is subject to the exclusive adjudicative scheme embodied in 39 U.S.C. § 3628. That scheme required that Currier pursue his claims through administrative proceedings before the Postal Rate Commission, *see id.* § 3624(a), then bring a challenge in a court of appeals, *see id.* § 3628. Currier does not seek, however, to overturn the Postal Service Board of Governors' rate determination – governed by the procedure set

(Continued on following page)

The Supreme Court reminded us in *Flamingo* that the two-step analysis first set out in *FDIC v. Meyer,* 510 U.S. 471, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994), governs inquiries into the Postal Service's amenability to suit. *See Flamingo,* 124 S. Ct. at 1327. In *Meyer,* the Court explained that

> The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver . . . the second inquiry comes into play – that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief.

Meyer, 510 U.S. at 484. Here, the parties do not dispute that 39 U.S.C. § 401(1)[6] enacts a broad waiver of sovereign immunity for the Postal Service. We must therefore decide whether Currier has a private right of action to obtain relief.

Currier urges various sources of substantive law. First, he contends that the no-fee box regulation itself comprises "the substantive law . . . intended to reach the federal entity," in the formulation of the *Flamingo* Court. *Flamingo,* 124 S. Ct. at 1327. Because the PRA and its implementing regulations are by definition directed at the Postal Service, he explains, Congress did not intend to exempt the Service from judicial review under them. Second, Currier argues that 39 U.S.C. § 409(a) – which

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forth in § 3628 – but rather challenges the Service's application of its eligibility restrictions for no-fee boxes to him. We therefore disagree with the Postal Service's alternative characterization of Currier's challenge.

[6] The provision permits the Postal Service "to sue and be sued in its official name." 39 U.S.C. § 401(1).

declares that "district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service" – confers a cause of action for violations of postal regulations. And finally, citing *People's Gas, Light & Coke Co. v. United States Postal Service,* 658 F.2d 1182 (7th Cir. 1981), he asserts that, even though the PRA broadly proscribes APA review of the Service's actions, the statute nevertheless permits "APA-like" judicial review of regulatory claims.

We are not persuaded that Congress, by enacting the PRA, intended to subject the Postal Service to suit for violations of regulations. "[A]dopted to increase the efficiency of the Postal Service and reduce political influences on its operations," *see Flamingo,* 124 S. Ct. at 1325, the PRA converted the Postal Department into a rara avis: "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201. While preserving the Service's public obligations, the Act "indicated that [Congress] wished the Postal Service to be run more like a business than had its predecessor, the Postal Department." *Franchise Tax Bd. v. United States Postal Serv.,* 467 U.S. 512, 519-20, 81 L. Ed. 2d 446, 104 S. Ct. 2549 (1984). Consistent with that goal, the Supreme Court has liberally construed 39 U.S.C. § 401(1)'s sue-or-be-sued clause, "presum[ing] that the Service's liability is the same as that of any other business." *Id.* at 520.

At the same time, the PRA provides that various forms of federal law, including the APA, that normally apply to government entities do not apply to the Service. *See* 39 U.S.C. § 410(a). Thus, the Service is exempt from the APA's general mandate of judicial review of agency actions. Given this statutory backdrop, we are satisfied that the PRA evinces Congress's general intent to withdraw

judicial scrutiny of postal regulations. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984); *Ruff v. Hodel*, 770 F.2d 839, 840 (1985). In the face of such clear evidence, we also decline to override the PRA's express removal of APA review of the Service's actions by imputing an implicit Congressional intent to preserve common-law principles of judicial review. *Cf. Carlin v. McKean*, 262 U.S. App. D.C. 212, 823 F.2d 620, 623 (D.C. Cir. 1987) (suggesting without deciding that common-law administrative review may not survive PRA's explicit removal of APA review).

We have previously observed, moreover, that § 409(a) itself "does not confer subject matter jurisdiction for actions in which the Service is a party, but requires a 'substantive legal framework' of federal law to confer federal subject matter jurisdiction." *Janakes v. United States Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985). We find that a substantive legal framework is lacking here. As a regulation, the no-fee box policy does not create a private right of action of its own force. As the Supreme Court explained in *Cort v. Ash:*

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose especial benefit the statute was enacted – that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically

> the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975) (internal quotation and citations omitted). The Court has further emphasized that the second and third factors are determinative: "Unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 94, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981).

Given Congress's intent to insulate the Postal Service from administrative challenges and to place the Service on a business like footing, we are satisfied that the second and third factors militate against our inferring a private right of action under the no-fee box regulation. *See Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 145, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985) (concluding that "legislative intent and consistency with the legislative scheme" trumped other factors' support for implied right of action); *In re Wash. Pub. Power Supply Sys. Sec. Litig.,* 823 F.2d 1349, 1354 (9th Cir. 1987) ("Even if the first factor were satisfied, we find that plaintiffs have failed to clear the second and third *Cort v. Ash* hurdles[.]"). We therefore conclude that the district court properly dismissed Currier's claim that the Service violated its no-fee box regulation for lack of subject-matter jurisdiction.

B

In contrast to Currier's regulatory challenge, the district court concluded that it possessed jurisdiction to

consider Currier's claim under 39 U.S.C. § 403(c), which prohibits the Service from "mak[ing] any undue or unreasonable discrimination among users of the mails."[7] And we agree that the application of the *Cort v. Ash* factors counsels in favor of inferring a private right of action in § 403(c). As the district court correctly noted, this provision was intended to benefit consumers such as Currier, and Congress was particularly concerned with preventing the Postal Service from engaging in unreasonable discrimination. *See Currier,* 190 F. Supp. 2d at 1228 n.10; *see also* H.R. Rep. No. 91-1104 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3682 (explaining that § 403(c) "enjoins the Postal Service from unduly or unreasonably discriminating among users or granting undue or unreasonable preferences in providing services[.]"). A private right of action alleging unreasonable discrimination under § 403(c) is therefore "consistent with the underlying purposes of the legislative scheme[.]" *Cort,* 422 U.S. at 78. We therefore conclude that the district court properly exercised subject-matter jurisdiction over Currier's statutory claim.

C

The Postal Service does not dispute that the district court had jurisdiction over Currier's constitutional claims, *see Meyer,* 510 U.S. at 483, whose merits we now turn to consider.

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[7] The provision reads in full: "In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user." 39 U.S.C. § 403(c).

III

Currier challenges the Postal Service's general delivery and no-fee postal box regulations on First Amendment and equal protection grounds. He asserts that the Service's provision of general delivery mail service at only Seattle's Main Post Office – rather than at the 32 branch offices in the greater Seattle area – violates homeless persons' First Amendment right to receive mail. By forcing those homeless persons who depend on general delivery to receive mail only at the Main Post Office, the general delivery regulation also violates the equal protection guarantees incorporated in the Fifth Amendment's Due Process Clause. Similarly, Currier contends that the no-fee postal box regulation breaches both the First Amendment and equal protection because some people who are ineligible for carrier delivery are given free postal boxes, while the homeless, who are also ineligible for carrier delivery, are not.

A

It is axiomatic that restrictions upon the mail system implicate the First Amendment. As the Supreme Court stated in *Blount v. Rizzi,* "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . . ." 400 U.S. 410, 416, 27 L. Ed. 2d 498, 91 S. Ct. 423 (1971) (quoting *U.S. ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson,* 255 U.S. 407, 437, 65 L.Ed. 704, 41 S. Ct. 352 (1921)) (Holmes, J., dissenting) (alteration in original); *see also Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 80, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983) (Rehnquist, J., concurring in the judgment) ("A prohibition on the use of the mails is a

significant restriction of First Amendment rights."). The Court has not limited constitutional protection to those who seek to send mail; recipients of mail also have enforceable First Amendment rights. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 307, 14 L. Ed. 2d 398, 85 S. Ct. 1493 (1965) (holding that requiring recipient to request in writing that "communist political propaganda" be delivered to him was an "unconstitutional abridgment of the addressee's First Amendment rights."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) (acknowledging a First Amendment right to receive mailed advertising). We must therefore decide whether the burden on Currier's First Amendment rights here rises to the level of a constitutional violation.

Our inquiry consists of the traditional tripartite forum analysis: we must first determine the relevant forum in which Currier seeks to exercise his First Amendment rights; then decide whether the forum is public or nonpublic in nature; and, finally, we must apply the appropriate level of scrutiny as dictated by the nature of the forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985).

1

Although speech forum analysis is most commonly applied to the government's physical property, the Supreme Court has endorsed its use in considering for a defined "more in a metaphysical than in a spatial or geographic sense." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995) (reimbursement program for student

publication costs a limited public forum); *see also Cornelius,* 473 U.S. at 801 (charitable contribution program a nonpublic forum); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 48-49, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983) (internal school mail system a non-public forum). In this case, Currier's First Amendment claims depend on the existence of a similarly metaphysical forum.

Currier argues that the relevant forum is the mail system as a whole. However, we are mindful of the Supreme Court's admonition that, while the "nature and function" of the system should not be ignored, courts should "focus[] on the access sought by the speaker" and not the system in general. *See Cornelius,* 473 U.S. at 801-02. Here, Currier seeks greater access to the general delivery mail system, contending that the service should be offered at branch post offices. Thus, the relevant forum is appropriately limited to the general delivery service, not the mail system as a whole. *See id.* at 801 (charitable campaign rather than federal workplace was forum where plaintiffs sought to be listed in campaign); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 128, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981) (letterbox constituted relevant unit of forum analysis where plaintiffs sought to place unstamped handbills in letterboxes).

2

The next inquiry is whether general delivery service is a public or nonpublic forum.

a

The Supreme Court has delineated three categories of fora. Traditional public fora comprise those areas – such as streets and parks – that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry,* 460 U.S. at 45 (internal quotation and citation omitted). The Court has been reluctant to extend the concept to new contexts, "reject[ing] the view that traditional public forum status extends beyond its historic confines." *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 678, 140 L. Ed. 2d 875, 118 S. Ct. 1633 (1998); *see also United States v. Am. Library Ass'n, Inc.,* 539 U.S. 194, 206, 156 L. Ed. 2d 221, 123 S. Ct. 2297 (2003) (refusing to declare Internet access in a public library either a traditional or designated public forum). The government's ability to proscribe speech in a public forum is "sharply circumscribed." *Perry,* 460 U.S. at 45. A content-based exclusion requires a showing "that [the government's] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* Content-neutral restrictions are reviewed under the traditional time, place, and manner test, and are thus permissible if they are "narrowly drawn to serve a significant government interest, and leave open ample channels of communication." *Id.*

Designated or limited public fora[8] are sites created by the government's express dedication of its property to

[8] The terms can be employed interchangeably. *See Rosenberger,* 515 U.S. at 829; *Am. Library Ass'n,* 539 U.S. 194 at 206 at 206-07, 156 L. Ed. 2d 221; *Kaplan v. County of Los Angeles,* 894 F.2d 1076, 1080 (9th Cir. 1990).

expressive conduct. *Id.* at 45-46. Such fora cannot be created by inaction, but only by an intentional governmental act. *Cornelius,* 473 U.S. at 802. The government may limit the forum to certain groups or subjects – although it may not discriminate on the basis of viewpoint – and may close the fora whenever it wants. *See Perry,* 460 U.S. at 46. As long as the government maintains the open character of the forum, it is subject to the same constitutional strict scrutiny that must be applied to traditional public fora. *See id.*

If a forum does not fit into either of the two public categories, it is a nonpublic forum. In a nonpublic forum, our scrutiny is less exacting: "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speakers's view." *Id.* at 46. Such sparing treatment stems from the oft-recognized principle that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Id.* (quoting *Greenburgh,* 453 U.S. at 129); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992); *United States v. Kokinda,* 497 U.S. 720, 725, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (plurality op.).

b

Currier argues that the mail system as a whole – and, by implication, its general delivery system – is a traditional public forum. The Postal Service responds that the general delivery service is most akin to a nonpublic forum.

The Supreme Court has resisted extending traditional public forum status beyond historic confines. *See Forbes,* 523 U.S. at 678. We see no indication that general delivery mail service should stand as the equivalent of "quintessential public forums" like parks or streets. *See Perry,* 460 U.S. at 45. We are satisfied that, as a form of mail delivery whose particular function is to serve transient persons, general delivery lacks the hallowed history as a crucible of unfettered public debate necessary to establish traditional public forum status. *See Am. Library Ass'n,* 539 U.S. at 206 ("The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking."). Given that the Court has noted that the government could eliminate postal service altogether if it so wished, *see Blount,* 400 U.S. at 416, we hesitate to declare a particular form of delivery a traditional public forum.

We are similarly reluctant to conclude that general delivery service is a limited public forum. To be sure, general delivery service can serve as medium for expressive activity: it is open to all members of the public without restriction and operates without regard to content or viewpoint. Nevertheless, we do not find that the Postal Service has here made "an affirmative choice to open up its property for use as a public forum." *Am. Library Ass'n,* 539 U.S. at 206. Unlike the limited public forum created by the university's student publication reimbursement program in *Rosenberger,* general delivery was not set up to "encourage a diversity of views from private speakers." *Rosenberger,* 515 U.S. at 834; *see also Cornelius,* 473 U.S. at 805 ("The Government did not create the [Combined Federal Campaign] for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby

becomes a public forum for First Amendment purposes."). Instead, the Service's provision of general delivery service is meant merely to facilitate temporary mail delivery to a limited class of users.

Our conclusion that general delivery is a nonpublic forum is bolstered by our review of the Supreme Court's case law. In *Perry,* the Court concluded that teacher mailboxes in a school district's interschool mail system were not a public forum, and that the district could therefore validly exclude unions other than the teachers' exclusive bargaining representative from using the system. *See Perry,* 460 U.S. at 46. The *Greenburgh* Court rejected the claim that residential letter-boxes were a limited public forum. *See Greenburgh,* 453 U.S. at 128. And in *Kokinda,* a plurality of the Court found that a sidewalk had not been dedicated to expressive activity by the Postal Service. *See Kokinda,* 497 U.S. at 729-30. We have similarly found postal sidewalks to be nonpublic fora in *Jacobsen v. United States Postal Serv.,* 993 F.2d 649, 656 (9th Cir. 1992), and *Monterey County Democratic Cent. Comm. v. United States Postal Serv.,* 812 F.2d 1194, 1198 (9th Cir. 1987). Viewed against this backdrop, we are satisfied that general delivery – a functional method of mail delivery – is a nonpublic forum.

3

When a forum is nonpublic, we review government-imposed restrictions under a reasonableness standard. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius,* 473 U.S. at 808 (emphasis in original). But the government

may not "restrict speech in whatever way it likes." *Forbes,* 523 U.S. at 682. Such restrictions cannot "be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Id.*

Here, the Postal Service's decision to offer general delivery service at only one location is content- and viewpoint-neutral, applying to all customers equally. The Service contends that general delivery mail must be hand-sorted and requires a transaction with a person at the counter; thus, offering general delivery service at branch offices would overburden those offices' personnel. The Postal Service further asserts that the system would be cumbersome and inefficient given the number of branch offices and zip codes at issue. *Cf. Kokinda,* 497 U.S. at 731 (Postal Service regulation limiting solicitation on postal sidewalks was reasonable in view of Service's interest in efficient mail delivery); *Cornelius,* 473 U.S. at 809 (holding that limiting participation in federal charitable campaign was reasonable in order to minimize disruption in workplace); *Monterey County,* 812 F.2d at 1199 (Postal Service guideline prohibiting voter registration on post office sidewalks was reasonable in view of Service's interest in avoiding appearance of involvement in political process). In light of these concerns and general delivery's purpose as a temporary means of delivery, we conclude that the Service's confinement of general delivery to a single Seattle location is reasonable.[9]

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[9] We note that Currier essentially brings a facial challenge to the general delivery regulation, asserting that the Service's refusal to offer general delivery at branch offices violates homeless persons' First Amendment right to receive mail. *See Foti v. City of Menlo Park,* 146 F.3d 629, 635 (9th Cir. 1998) (discussing differences between facial and

(Continued on following page)

B

Currier also brings a First Amendment challenge to the Postal Service's former and current no-fee postal box regulations.[10] The former regulation made available a no-fee box to a customer ineligible for carrier delivery service "whose physical residence or business location is within the geographical delivery ZIP code boundaries administered by" a post office providing city carrier delivery. Domestic Mail Manual D910.5.1(a) (Issue 55, Jan. 10, 2000). The current regulation, revised to take into account increased security concerns, specifically requires a customer to have a physical address in order to be eligible for a no-fee box. *See* Domestic Mail Manual D910.5.2 (Issue 57, June 30, 2002).

Because Currier seeks access to a no-fee postal box, we evaluate such boxes as the relevant fora. *See Greenburgh,* 453 U.S. at 128. We are satisfied that no-fee boxes, like general delivery service, are nonpublic fora. In *Greenburgh,* the Supreme Court explained that residential letterboxes are non-public fora, noting that merely because "an instrumentality 'is used for the communication of ideas or information'" does not make it a public forum. *Id.* at 130 n.6. Here, no-fee postal boxes constitute a similar instrumentality.

The Postal Service's restrictions on the provision of no-fee boxes are content- and viewpoint-neutral. It points out,

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as-applied challenges). In rejecting this broad claim, we express no opinion regarding whether relief might be appropriate upon an individual plaintiff's affirmative demonstration that the regulation as applied to his individual circumstances effectively bars him from receiving mail at the sole general delivery location.

[10] The district court considered both regulations in rejecting Currier's First Amendment challenge. *See Currier,* 190 F. Supp. 2d at 1230 n.14.

moreover, that no-fee boxes are intended to serve persons in areas with low population density and are thus unavailable in large cities such as Seattle, where the Postal Service delivers mail to all physical addresses in the area. It further contends that the cost of providing no-fee boxes to all homeless persons would be substantial. Given these cost concerns and the Service's statutory mandate to provide efficient, economical service, its decision to provide no-fee boxes only to those customers who have physical addresses but are ineligible for carrier service is reasonable. Our conclusion is bolstered by the Supreme Court's clear dismissal of the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 546, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) (internal quotation and citation omitted); *see also Lyng v. UAW*, 485 U.S. 360, 369, 99 L. Ed. 2d 380, 108 S. Ct. 1184 (1988) (holding that federal government is not required by First Amendment to subsidize employee's right to express pro-union sentiments by permitting striking worker to receive food stamps); *Greenburgh*, 453 U.S. at 126-27 (rejecting contention that the "First Amendment guarantees [plaintiffs] the right to deposit, *without payment of postage*, their notices, circulars, and flyers in letterboxes") (emphasis added). The Service is not constitutionally obligated to provide no-fee boxes to homeless persons.

C

Currier further contends that the general delivery and no-fee box regulations offend equal protection.[11] The Postal

[11] The Fifth Amendment's Due Process Clause embodies the protections of the Fourteenth Amendment's Equal Protection Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954).

Service's refusal to offer general delivery service at branch offices in the zip codes where the homeless reside, he argues, singles out the homeless for discriminatory treatment. And by failing to provide no-fee boxes to the homeless while simultaneously offering them to other customers ineligible for carrier delivery, it impermissibly discriminates against homeless customers.

Given our conclusion that the regulations do not violate the First Amendment, however, Currier's equal protection challenge must fail. As we have explained: "[T]he viability of equal protection claims relating to expressive conduct is contingent on the existence of a public forum. Only when rights of access associated with a public forum are improperly limited may we conclude that a fundamental right is impinged." *Monterey County,* 812 F.2d at 1200 (citing *Perry,* 460 U.S. at 54-55). Because no fundamental right of access has been violated here, we evaluate whether the regulations "rationally further a legitimate public purpose." *Id.* (internal quotation omitted). And our rational-basis review is quite limited: "[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1051 (9th Cir. 2000) (internal quotation and citation omitted).

In this case, the Postal Service's limitation of general delivery service is a rational response to the inefficiencies and increased costs that would result from expanding general delivery to branch offices. *Cf. Greenburgh,* 453 U.S. at 133 (Postal Service's concern with maintaining efficient operations provided reasonable basis for denying

First Amendment claim). Similarly, the Service's cost-driven decision to offer no-fee boxes only to customers with physical addresses who are denied carrier service is a reasonable attempt to eliminate some disparities between customers who receive carrier delivery and those who do not. *See Geduldig v. Aiello,* 417 U.S. 484, 495, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974) (state may properly choose partly to remedy problem); *Dandridge v. Williams,* 397 U.S. 471, 487, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970) (equal protection does not require government to "attack[] every aspect of a problem"). We are therefore satisfied that the Service's regulations do not violate equal protection.[12]

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

CONCUR BY: GOULD (In Part)

DISSENT BY: GOULD (In Part)

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[12] Currier's statutory claim under 39 U.S.C. § 403(c) essentially rehashes his equal protection challenge, contending that the Service's regulations unreasonably discriminate against the homeless. However, the statute expressly contemplates that the Service will make reasonable distinctions among users of the mail system. *See UPS Worldwide Forwarding, Inc. v. United States Postal Serv.,* 66 F.3d 621, 624 (3d Cir. 1995); *Egger v. United States Postal Serv.,* 436 F. Supp. 138, 142 (W.D. Va. 1977); *see also Grover City v. United States Postal Serv.,* 391 F. Supp. 982, 986 (C.D. Cal. 1975) ("The Postal Service's delivery regulations are not unreasonably discriminatory because the distinctions made by the regulations are reasonably related to the effectuation of the pertinent objectives of the Postal Reorganization Act, which are provision of efficient mail delivery services at reasonable costs."). Because we conclude that the challenged regulations are rationally justified and thus do not violate equal protection, we are satisfied that the Service has also not breached its statutory mandate.

DISSENT:

GOULD, Circuit Judge, concurring in part and dissenting in part:

I concur in the judgment in this case, and I join Judge O'Scannlain's opinion except as to Parts III.A and III.B. I write separately first to express my view that the First Amendment challenge to the Post Office's delivery policies should be considered under at least the limited public forum doctrine. Nonetheless, even under that doctrine, I reject the Appellants' facial challenge to the Post Office's delivery policies. I also write separately to discuss an issue that we do not reach, one that the Appellants did not advance and that the majority opinion explicitly leaves open in its footnote nine. This deferred issue is whether the Post Office's general delivery regulations are constitutionally permissible if, in application to an individual person, they substantially burden that person's right to receive mail. This issue will squarely arise in an "as applied" challenge asserted by a homeless person who demonstrates an inability reasonably to gain access to general delivery mail at the main Post Office branch.

That a segment of citizens of our great country are left by the struggles of life with no home is unfortunate, to say the very least, but the struggles of the homeless neither detract from their character nor limit their right to exercise freedoms guaranteed by the Constitution. The right to receive mail is a fundamental aspect of the freedom of speech secured by the First Amendment. We recognize this important principle today, although we reject the facial constitutional challenge to the Post Office's general delivery system.

Notwithstanding our recognition of the right to receive mail, I am left with the impression that some homeless persons now living in the greater Seattle area cannot travel to Seattle's main post office without undue burden to retrieve general delivery mail because jobs, disabilities, or other circumstances prevent their travel. I agree with the majority that this issue is not squarely raised as the case was framed by the complaint and the proceedings on appeal. Yet, the issue warrants an expression of my views that may assist the Postal Service and the parties litigating for adequate procedures for the homeless.

The crux of the problem, as I see it, is that the United States Postal Service's current limitations on general delivery mail do not permit homeless persons to apply for general delivery at branch post offices under any condition whatsoever, even in cases of undue hardship. This unyielding policy unreasonably and substantially impairs the ability of some homeless persons to receive mail and to exercise their First Amendment rights. Nothing further can be declared in this case. But in an appropriate case, I would hold that, although the Post Office need not routinely make general delivery available at all branch post offices for all persons who are homeless, the Postal Service's regulations, to comply with the First Amendment, must make due provision for general delivery to a homeless person at a branch office when that person has shown undue hardship in retrieving mail at the main post office.

* * *

The right to receive mail is protected by the First Amendment. *Lamont v. Postmaster General,* 381 U.S. 301, 14 L. Ed. 2d 398, 85 S. Ct. 1493 (1965) (holding

unconstitutional under the First Amendment a law that burdened the individual's receipt of mail). The right to receive and send mail through the postal system is "almost as much a part of free speech as the right to use our tongues." *Id.* at 305 (quoting Justice Holmes' dissent in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson,* 255 U.S. 407, 437, 65 L.Ed. 704, 41 S. Ct. 352 (1921)). Before the telegraph, telephone, electronic mail, and hand-held communication devices, there was mail – a bedrock of communication. Linking the government to the people, the mail system was at its inception "to many citizens across the country the most visible symbol of national unity." *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 122, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981).

When our Constitution was first penned, the Framers recognized the importance of mail delivery and gave Congress explicit power to create a national postal system. U.S. Const. Art. I, § 8, cl. 7. A federal postal system was developed, and as the nation grew it built roads, canals, and railroads to facilitate mail delivery. From inception of our nation to the present, the delivery of the mail has been a foundation of our civilization, of our discourse as a people, of our economic well-being, and of our communications for family and leisure purposes.

At the forefront of its mandate to the Postal Service, Congress recognized the power of the post to connect government to people, people to government, and people to people:

> The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution,

> created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities.

39 U.S.C. § 101(a).

Because plaintiffs, a class of homeless persons living in the City of Seattle, do not have a physical address, they cannot benefit from the typical carrier delivery service. Also, without a physical address plaintiffs cannot, under Postal Service regulations, obtain a post office box even for a fee. The homeless are left to depend on the Postal Service's general delivery service if they are ever to receive mail. And even though the City of Seattle covers eighty-four square miles, general delivery service is now available only at the main post office in downtown Seattle during limited business hours. Moreover, the policy of providing general delivery service at only one location is applied without regard to where the recipients of general delivery mail might live, their financial status, or, perhaps most importantly, their ability to travel to the downtown post office during the hours that general delivery service is available.

I do not doubt that the Postal Service has a legitimate interest in avoiding the expense and administrative burden to the government that might be caused by a general practice of delivering mail to homeless persons at any branch office requested by the person under any circumstances, regardless of need. But I do not believe our

Constitution would permit us to ignore, in a case where issues of burden are properly framed for particular persons, that the Postal Service's current policies and regulations in some cases will grievously burden the First Amendment rights of some homeless persons.

I see no policy reason advanced by the Postal Service why this must be so. The homeless plaintiffs here have asked only for broad and not for limited relief, and it is not surprising perhaps that the Postal Service in this case did not address whether its regulations could be modified at modest expense to permit general delivery to some homeless persons at branch post offices under demanding individual circumstances. Nonetheless, in assessing the homeless plaintiffs' First Amendment claims, in an appropriate case we will need to consider if the current policies and procedures chosen by the Postal Service are so unresponsive to particular human burdens as to violate the Constitution.

All should agree that when a homeless person can make a showing of particular circumstances preventing retrieval of general delivery mail at the main post office, that homeless person will be cut off from all communication by mail with family, friends, the government or others who may want to communicate with him or her. To determine whether grievous burdens on First Amendment rights for some homeless persons rise to the level of a constitutional violation, we must apply the tripartite forum analysis that has been prescribed by the Supreme Court. *Cornelius v. NAACP Legal Defense and Educ. Fund,* 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). It is here where I depart from the panel majority.

The first of the three steps is to identify the forum to which the plaintiffs seek access. *Id.* at 801. Simply stated, members of the homeless community want to receive their mail. This reflects nothing more, and nothing less, than a basic human need for communication. In feeling this need, the homeless stand on equal footing with others quartered more comfortably. Plaintiffs allege that there is currently no viable way of receiving mail on a regular and reliable basis. Plaintiffs challenge the general delivery service and the no-fee post office box not because the homeless plaintiffs want these specific services but because these services are potential means for plaintiffs to exercise their paramount right to receive mail despite their homelessness. For plaintiffs, seeking access to general delivery service, the no-fee post office box service, or any other service is a way to gain access to the mail system. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46-47, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983) (analyzing as the relevant forum the internal school mail system to which a rival teacher's union sought access). It is access to mail that is the relevant forum.

Having determined that the mail system is the relevant forum, the second and next step in the required forum analysis is to determine whether the mail system is a public forum or nonpublic forum. *Cornelius,* 473 U.S. at 802.[1] Because the mail system is a "channel of

[1] Though there are two different types of public fora, traditional or limited, the "time, place and manner" test applies to both limited public fora and traditional public fora when the regulations are content neutral: "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry,* 460 U.S. at 46. It is not necessary to decide whether the mail system is a traditional

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communication" created by the government "for use by the public at large for assembly and speech," *id.*, it can properly be characterized as a public forum. *See United States Postal Serv. v. Council of Greenburgh Civic Ass'n,* 453 U.S. 114, 137-38, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981) (Brennan, J., concurring) (concluding that "the mails and the letterbox are specifically used for the communication of information and ideas, and thus surely constitute a public forum"); 39 U.S.C. § 101(a) (requiring that the Postal Service provide the "basic and fundamental service" to "the people."). *But cf. Perry,* 460 U.S. at 46-47 (concluding that the school's internal mail system was a nonpublic forum).[2]

If, as I have concluded, the mail system is a public forum, then the Postal Service regulations challenged by the plaintiffs, namely the general delivery service restrictions, are subject to the "time, place and manner" test. To pass constitutional muster under the "time, place and manner test," the restrictions must be: (1) "justified without reference to the content of the regulated speech," (2) "narrowly tailored to serve a significant governmental interest," and (3) able to "leave open ample alternative

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public forum or a limited public forum because it qualifies as at least a limited public forum and thus the constitutional test is the same.

[2] The Supreme Court's conclusion in *Perry* was based on the fact that the plaintiffs were not among the class of people specifically permitted by the school to use the forum and were unlike the class of people who were allowed to use the forum. 460 U.S. at 47-48. Here, by contrast, the mail system is open to the public at large and plaintiffs do not fall outside of the operating bounds of the mail system. *Cf. Greenburgh,* 453 U.S. at 137 (Brennan, J., concurring) (noting that "[o]nly where the exercise of First Amendment rights is incompatible with the normal activity occurring on public property have we held that the property is not a public forum.").

channels for communication of the information." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).

Plaintiffs do not contend that the restrictions on the general delivery service are not content-neutral. The limitation on general delivery mail applies to the homeless whether they receive letters from family or notes from friends, whether they look for correspondence on the lighter affairs of life or letters of the greatest gravity, whether their mail is personal or political, whether it relates to finances or fun. So, the first prong of the "time, place and manner" test is satisfied. All mail to the homeless regardless of content comes with the same burden.

As to the second prong, the Postal Service's stated interests in restricting the general delivery service to the main post office are cost and efficiency. Congress established the Postal Service as a pseudo-private agency, giving the Postal Service flexibility to control its costs and develop businesslike plans for economical, effective operations. *See Nat'l Ass'n of Postal Supervisors v. United States Postal Serv.,* 195 U.S. App. D.C. 242, 602 F.2d 420, 430-31 (D.C. Cir. 1979) (reviewing legislative history and purpose for Postal Reorganization Act). Because Congress intended the Postal Service to operate in a businesslike manner, the Postal Service has a good, strong interest in maintaining low costs. *Cf. Kaplan v. County of Los Angeles,* 894 F.2d 1076, 1081 (9th Cir. 1990) (holding that a public entity does not violate the First Amendment by collecting charges that fairly reflect costs of maintaining a limited public forum). For purposes of the "time, place and manner" test, I conclude that the restrictions are properly and narrowly tailored to serve the government's significant interests because the Postal Service can more effectively

keep costs down, to the benefit of all served by the postal system, by limiting the general delivery service to the downtown post office. *Ward,* 491 U.S. at 798 (explaining that "narrowly tailored" does not require that the regulation to be the least restrictive means available but rather that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation").

The Postal Service regulations in my view satisfy the first two prongs of the "time, place and manner" test, but the Postal Service's restrictions of general delivery will still run afoul of the third prong, and thus offend the First Amendment, if there are not ample alternative channels for communication. Because the plaintiffs are homeless, the mail service is the only means for them to receive notification of governmental benefits such as veteran's benefits or public housing opportunities. Lacking a physical address, plaintiffs cannot avail themselves of other services offered by the Postal Service, such as obtaining a post office box even for a fee. And, though some homeless shelters and service centers provide mail service, such services are limited and often unreliable.

For these reasons, the only viable means for members of the homeless community to receive mail is by general delivery service. Seen in this light, I conclude that the limited general delivery service currently offered by the Postal Service is not sufficient for all homeless persons.[3]

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[3] That the regulation only impermissibly burdens some, not all or most, homeless persons is why I reject the Appellants' facial challenge to the delivery regulations. But, as applied to those who cannot get general delivery at the main Post Office because of undue hardship, in my view the delivery regulations must give way to First Amendment

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While general delivery might be adequate for some homeless persons – those that can reasonably be expected to travel to the downtown post office on a regular basis to pick up mail during the specified times – limited general delivery is not at all sufficient for homeless persons like sixty-one year old Willard Johnson, whose shelter is nine miles from the downtown post office, whose arthritis makes it difficult and painful for him to travel long distances, and who was almost terminated from receiving public assistance because he did not receive notice of a case appointment sent to him at another shelter.

Considering that the bulk of the population gets mail delivered to the front step of a home or in the lobby of an apartment building, it is unreasonable to burden homeless persons in all cases, regardless of their individual circumstances, with the task of taking public transportation for several miles at particular hours, during which they might be expected to be at work, if they are to pick up their mail. This concern is exacerbated by the problem that a long and hopeful journey to the main post office in many cases might greet the homeless with nothing but junk mail. These trips are ones that plaintiffs are bound to repeat every couple of days to avoid missing potentially important communication regarding government services. And in some cases, particularly those involving the disabled, there is not merely a grave burden but a practical impossibility for the homeless to reach the main office at required times to get mail.

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values. It would be unreasonable to require the Post Office to provide general delivery upon demand at any branch with no particularized showing of need; but it also would be unreasonable to say that the Post Office need not customize a general delivery system in cases where a homeless resident would otherwise be deprived of all mail service if required to access general delivery at the main branch.

In cases where general delivery service at the main post office is not a practicable venue, or comes only with undue burden, we should see that this effective denial of mail delivery is an egregious infringement of First Amendment rights, particularly when one considers that people who are homeless often do not have access to other important methods of communication such as the telephone or email. Contact through the mail system may be the only way that homeless people can be notified of potentially life-altering information or services such as the availability of public housing, receipt of veteran's benefits, or communications relating to other social services. And it may be the only way the homeless can keep in touch with a parent, a child, or a friend.

While I would agree that the Postal Service is not constitutionally required to expand services to any person who is otherwise effectively served by the existing system, and while the Postal Service is not constitutionally required to expand without restraint or condition general delivery services in particular,[4] I would conclude that the

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[4] Because in a proper case I would conclude that the Postal Service has violated the First Amendment by effectively denying some of the members of the plaintiff class access to the mail system, the Postal Service would be free to adopt any changes to their mail service that would adequately afford all plaintiffs such access. One possible remedy might look like this: The Postal Service could continue to collect all of the general delivery mail at the main post office but allow persons without a physical address to fill out a sworn form or affidavit at the main post office requesting that their general delivery mail be forwarded to another, more convenient post office branch when necessary to avoid a particular undue burden to them based on specific circumstances to which they can attest. The Postal Service could devise a fair-minded standard that would generally accomplish efficiencies but accommodate the unusual cases where a particular undue burden on a homeless person makes a routing of general delivery mail to their

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Postal Service's current regulations and operation offend the First Amendment by effectively precluding mail delivery to some homeless persons who lack an adequate alternative channel of communication if they practically cannot receive general delivery mail at the main post office.

This issue is not squarely presented, and in footnote 9 of the majority opinion, has been left open for another day. As to the Appellants' facial First Amendment challenge to the postal delivery regulations, I disagree with the majority that "non-public" forum analysis applies. Instead, I would hold that the delivery of the mail is a public forum. Nonetheless, applying the test for public forums leads me to conclude that the Appellants' facial challenge must in general fail, though I would reach a different result in the proper "as-applied" case where undue burden was shown. I therefore concur in the judgment of the panel majority as to Part III.A and Part III.B. I also join in full the remainder of the panel majority's opinion.

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neighborhood branch fair and reasonable. The Postal Service might also limit the forwarding requests such that mail could only be forwarded from the main post office to branch offices but not between branch offices, like mail moving from the hub of the wheel outward but not along the rim. Such a system would allow the Postal Service to maintain a centralized location where it could sort and conduct security screening of general delivery mail and at the same time the Postal Service in exceptional cases meeting the undue burden standard could forward the sorted bundles of general delivery mail using a forwarding service that is already established and provided to persons with physical addresses when they move.

APPENDIX B

CARL A. CURRIER, et al., Plaintiffs, v. WILLIAM J. HENDERSON, et al., Defendants.

Case No. C01-0156L

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SEATTLE DIVISION

190 F. Supp. 2d 1221; 2002 U.S. Dist. LEXIS 4409

January 30, 2002, Decided
January 30, 2002, Filed

COUNSEL: For CARL A CURRIER, DAVID BAR, WILLARD JOHNSON, SEATTLE HOUSING AND RESOURCE EFFORT, plaintiffs: David B Girard, Casey Trupin, COLUMBIA LEGAL SERVICES, SEATTLE, WA.

For WILLIAM J HENDERSON, DALE R ZINSER, UNITED STATES POSTAL SERVICE, defendants: Robert Maxwell Taylor, U S ATTORNEY'S OFFICE, SEATTLE, WA.

JUDGES: Robert S. Lasnik, United States District Judge.

OPINION BY: Robert S. Lasnik

OPINION:

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on defendants' motion to dismiss plaintiffs' claims for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted. For the following reasons, defendants' motion is granted.

BACKGROUND

This action was brought by Carl Currier ("Currier"), David Bar ("Bar") and Willard Johnson ("Johnson"), three homeless individuals in Seattle, and Seattle Housing and Resource Effort ("SHARE"), an advocacy group that advocates on behalf of the Seattle homeless. Defendants are former and current officials of the United States Postal Service ("Postal Service") and the Postal Service itself.

In May and June of 2000, the individual plaintiffs inquired about three services offered by the Postal Service: postal box rental, no-fee postal boxes and "General Delivery." As described in affidavits by officers of the Postal Service, postal boxes are available for a fee to customers who can identify their physical addresses. (Declaration of Robert L. Nelson ("Nelson Decl.") ¶ 9). Before October 9, 2001, homeless people who wanted to rent postal boxes could do so if they were personally known to the postmaster or box clerk, submitted identification such as a driver's license, or provided a verifiable point of contact such as a shelter or public service office. (Nelson Decl. ¶ 12.) Since October 9, 2001, the Postal Service has tightened the regulations to require that homeless people provide a verifiable point of contact to be eligible to rent a postal box even if they are known to the postmaster or provide the proper identification. (Factual Addendum to Federal Defendants's Mot. to Dismiss at 3.)

Certain customers are provided no-fee postal boxes under the "Group E Rate" program. (Nelson Decl. ¶ 10.) These are customers with physical addresses to whom the Postal Service does not provide carrier service for operational or policy reasons. For instance, the Postal Service could choose not to deliver to a house if the area is one of

low density or if a person resides within a quarter mile of a rural post office. Such customers would be eligible for no-fee postal boxes. (Declaration of John Dorsey ("Dorsey Decl.") ¶ 5-14.) Group E Rate is not available in urban areas or large cities because the Postal Service delivers mail to all physical delivery points in such areas. Homeless people, as well as RV owners, merchant seamen, itinerant farm workers, construction workers who move with their work, persons living on a boat or traveling with a circus and people who camp in remote sites are ineligible for this service. (Dorsey Decl. ¶ 15.)

Finally, "General Delivery" service can be useful for a person who does not have a physical address. Such a person can receive mail addressed to his or her name, with the designation "General Delivery, [City Name]." The mail is held for pickup at a designated post office for 30 days. In any large city with multiple stations or branches, General Delivery is available at only one designated facility. Even though General Delivery is intended as a temporary means of getting mail, a person may receive General Delivery indefinitely. (Nelson Decl. ¶ 11.)

Plaintiffs allege that they encountered various forms of resistance when they tried to avail themselves of the above services. All were told they were ineligible for no-fee postal boxes and that they could get General Delivery service only at the Main Post Office at Third Avenue and Union Street in Seattle but nowhere else in the city. Bar and Currier were told that they could not get postal box service without providing a physical address and that they could get General Delivery service for only 30 days. Currier was not allowed to rent a postal box despite providing an identification card from a shelter. Johnson was allowed to apply for a postal box after he provided his driver's

license. Most of the refusals faced by the plaintiffs are built into Postal Service regulations.

Plaintiffs allege violations of Postal Service regulations, the Postal Reorganization Act ("PRA"), Administrative Procedure Act ("APA"), the First Amendment and the Equal Protection component of the Due Process clause of the Fifth Amendment. Plaintiffs seek declaratory and injunctive relief as well as damages.

Defendants have filed a motion to dismiss the claims against the individual officers, to dismiss the claims alleging violations of regulations and statutes on jurisdictional grounds and to dismiss the constitutional claims for plaintiffs' alleged failure to articulate them.

ANALYSIS

A. CLAIMS AGAINST INDIVIDUAL DEFENDANTS

Defendants seek to dismiss claims against William Henderson ("Henderson"), the former Postmaster General, and Dale Zinser ("Zinser"), the Seattle Postal District Manager, in their individual and official capacities. Plaintiffs have not opposed dismissal of these defendants. There is no suggestion that Henderson and Dale were personally involved in any way in the alleged violations, which is a requirement in this Circuit. *See Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989). In similar circumstances, the Court of Appeals for the District of Columbia Circuit has held that "actions of this sort should be brought only against the Postal Service itself." *National Association of Postal Supervisors v. Postal Service,* 195 U.S. App. D.C. 242, 602 F.2d 420, 423 n.1 (D.C. Cir. 1979).

This Court holds that claims against Henderson and Zinser shall be dismissed.

B. SUBJECT MATTER JURISDICTION OF THIS COURT

Federal courts are courts of limited jurisdiction. Generally, "it is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 80 L. Ed. 1135, 56 S. Ct. 780 (1936). In addition, claims against governmental entities such as the Postal Service need to cross the hurdle of sovereign immunity which these entities enjoy. *See Cohens v. Virginia,* 19 U.S. 264, 411-12, 5 L. Ed. 257 (1821) (holding "that no suit can be commenced or prosecuted against the United States"); *Franchise Tax Board of California v. Postal Service,* 467 U.S. 512, 516-17, 81 L. Ed. 2d 446, 104 S. Ct. 2549 (1984). Sovereign immunity can, however, be waived by Congress, allowing courts to assert jurisdiction over such claims. *F.D.I.C. v. Meyer,* 510 U.S. 471, 475, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994). Here, plaintiffs have alleged that this Court has subject matter jurisdiction pursuant to 28 U.S.C § 1331,[1] 28 U.S.C. § 1339,[2] and 39 U.S.C. § 409(a).[3]

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[1] 28 U.S.C. § 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[2] 28 U.S.C. § 1339 reads: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service."

[3] 39 U.S.C. § 409(a) provides that the "United States district courts shall have original but not exclusive jurisdiction over all actions

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In asserting that this Court's jurisdiction over their claims is proper under 39 U.S.C. § 409(a), plaintiffs point to the language of the statute, which states that "the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." 39 U.S.C. § 409(a). (Plaintiffs' Resp. to Defendants' Mot. to Dismiss ("Plaintiffs' Resp") at 5)

As acknowledged by plaintiffs, the Ninth Circuit has held that the statute "does not confer subject matter jurisdiction." *Janakes v. Postal Service,* 768 F.2d 1091, 1093 (9th Cir. 1985) (quoting *Peoples Gas, Light & Coke Co. v. Postal Service,* 658 F.2d 1182, 1189 (7th Cir. 1981)). Plaintiffs urge this Court to ignore *Janakes* because the Ninth Circuit stated that the real purpose of 39 U.S.C. § 409(a) was to "remove[] the barriers of sovereign immunity." *Janakes,* 768 F.2d at 1093. Plaintiffs point to *Franchise Tax,* a Supreme Court case decided one year after *Peoples Gas,* in which the Court assumed that it was another statute, 39 U.S.C. § 401(1), that was the "statutory waiver of immunity." *Franchise Tax,* 467 U.S. at 517.[4] Given this inconsistency, plaintiffs urge this Court to read 39 U.S.C. § 409(a) as what it seems to be: a conferral of subject matter jurisdiction "in cases involving the Postal Service." (Plaintiffs' Resp. at 4.)

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brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28."

[4] 39 U.S.C. § 401(1) reads in pertinent part: "The Postal Service shall have the following general powers: (1) to sue and be sued in its official name . . ."

Despite the seeming inconsistency between the approaches of *Janakes* and *Franchise Tax,* the substance of the analysis suggested by each is similar. Under *Janakes,* which adopted without comment the holding in *Peoples Gas,* subject matter jurisdiction under 39 U.S.C. § 409(a) is proper only when a party can point to a substantive legal framework that creates the cause of action. *See Peoples Gas,* 658 F.2d at 1189. In the *Janakes/Peoples Gas* line of analysis, then, the focus is on finding a substantive legal framework, which, in turn, depends at least partially on Congressional intent. *Id.* at 1190.

Under the analysis suggested by *Franchise Tax* and other Supreme Court decisions, the emphasis is placed on whether sovereign immunity for a federal entity has been waived. In *Franchise Tax,* the Supreme Court considered the Postal Service's immunity waived under 39 U.S.C. § 401(1). *See Franchise Tax,* 467 U.S. at 519, 520. However, the Court did not assume that immunity was waived without limits. In fact, the Court stated that "intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax,* 467 U.S. at 521. The issue in that case was whether an order to withhold wages issued by a California administrative agency pursuant to a state statute fell within the scope of the waiver. The Court found that Congress had intended that the Postal Service's liability would be "the same as that of any other business" and immunity was waived because the "order to withhold has precisely the same effect on [the Postal Service's] ability to operate efficiently as it does on that of any other employer subject to the California statute." *Id.* at 520-23. Therefore, the analysis employed in *Franchise Tax* also leads to an inquiry into Congressional intent.

Since the *Franchise Tax* decision, the Supreme Court has stated that waivers of immunity by sue and be sued clauses are to be construed broadly and "cannot be limited by implication unless there has been a 'clear showing that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the sue and be sued' clause in a narrow sense.'" *Meyer,* 510 U.S. at 480 (quoting *Federal Housing Administration v. Burr,* 309 U.S. 242, 245, 84 L. Ed. 724, 60 S. Ct. 488 (1940)).

Keeping these principles in mind, the Court turns to the issues raised in the motion before it.

Congress passed 39 U.S.C. § 401 as part of the Postal Reorganization Act of 1970 ("PRA") that created the Postal Service. In enacting the PRA, Congress abolished the Post Office Department, which had delivered mail since 1789, and established the Postal Service as a quasi-independent agency under the direction of an 11-member Board of Governors. The legislative history makes it clear that the main goal of the PRA was to make the Postal Service an efficient, self-sustaining organization with improved labor-management relations. The legislation was intended to "eliminate serious handicaps that are now imposed on the Postal Service by certain legislative, budgetary, financial, and personnel policies that are outmoded, unnecessary, and inconsistent with modern management in business practices that must be available if the American public is to enjoy efficient and economical postal service." H.R.Rep. No. 91-1104, 91st Cong.2d Sess. at 2 (1970). The case law acknowledges this Congressional mandate. *See, e.g.,*

Peoples Gas, 658 F.2d at 1196 (reviewing legislative history and concluding that the PRA sought to "protect the public's interest in efficient and economical postal service"); *Franchise Tax,* 467 U.S. at 519-20 (noting that Congress "indicated that it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department"); *Loeffler v. Frank,* 486 U.S. 549, 556, 100 L. Ed. 2d 549, 108 S. Ct. 1965 (1988) (noting that by passing the PRA, Congress created liability for the Postal Service that was the "same as that of any other business" so that sovereign immunity was waived in the case of a claim for pre-judgment interest); *Far West Federal Bank, S.B. v. Office of Thrift Supervision-Director,* 119 F.3d 1358, 1367 (9th Cir. 1997) (comparing the waiver of sovereignty of the Postal Service with the corresponding waiver of the FDIC and noting that the former was related to the Postal Service's status as a commercial enterprise); *UPS Worldwide Forwarding, Inc. v. Postal Service,* 66 F.3d 621, 634 (3rd Cir. 1995) (noting that "Congress repeatedly indicated that a primary purpose underlying the PRA was to require the Postal Service to discard its system of political patronage and bureaucratic decision-making in favor of modern business practices").

However, the agency is clearly not an ordinary profit-seeking commercial enterprise. It still retains the public service features of a governmental entity. Under the PRA, the Service is to be "operated as a basic and fundamental service provided to the people by the Government of the United States." 39 U.S.C. § 101(a). It is not to be motivated solely by profit but "shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people." *Id.*

Under these principles, the Court holds that there is no waiver of immunity, no substantive legal basis and no jurisdiction over claims asserted under Postal Service regulations.[5] The Court relies on its analysis of the legislative history of the PRA and agrees with the court in *Unicover Corp. v. Postal Service,* 859 F. Supp. 1437, 1443 (D. Wyo. 1994) that "generally, the Postal Service's regulations do not create a cause of action of their own force." Any other resolution would fly in the face of Congressional intent to allow the Postal Service to operate without excessive constraints. Therefore, all claims alleging violations of the Postal Service regulations shall be dismissed for lack of subject matter jurisdiction.[6]

Furthermore, this Court has no subject matter jurisdiction over claims asserted under the APA. Even though the APA, 5 U.S.C. § 706, generally subjects agency actions to judicial review, the PRA specifically exempts the Postal Service from such review. Under the PRA, "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5 [i.e. the APA administrative procedures and judicial review provisions],

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[5] The relevant Postal Service regulations for the purpose of this action are Domestic Mail Manual § D910 and Postal Bulletin 21877. (Compl. ¶¶ 75, 82.)

[6] This holding is the same when the Court considers the effect of 39 U.S.C. § 409(a), 28 U.S.C. § 1331 or 28 U.S.C. § 1339, since, as explained above, a waiver of immunity is a pre-requisite for jurisdiction.

It should also be noted that some violations of Postal Service regulations have been conceded by the Service. The Service has attempted to address these matters by reminding its personnel of the rules regarding rentals of postal boxes and those regarding General Delivery. (Defendants' Mem. in Supp. of Mot. to Dismiss at 6.)

shall apply to the exercise of the powers of the Postal Service." 39 U.S.C. § 410(a).[7] Given this language, the Court must dismiss claims brought under the APA for lack of jurisdiction.[8] *See Spinks v. Postal Service,* 621 F.2d 987, 989 (9th Cir. 1980). *See also National Retired Teachers Ass'n v. United States,* 193 U.S. App. D.C. 206, 593 F.2d 1360, 1365 n.21 (D.C. Cir. 1979) (noting that "Congress expressly made portions of the APA applicable [to the Postal Service], an effort that would have been superfluous if the APA applied in any event"); *Morris v. Runyon,* 870 F. Supp. 362, 370 (D.D.C. 1994) (noting that "to foster the efficiency of the redesigned Postal Service, Congress explicitly exempted it from, *inter alia,* the Administrative Procedure Act"). There is neither a substantive legal framework, as required by *Peoples Gas/Janakes,* nor is there a waiver of sovereign immunity with respect to these

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[7] Additionally, it should be noted that the APA specifically allows Congress to override its judicial review provisions. According to the statute, its judicial review provisions apply "except to the extent that . . . statutes preclude judicial review." 5 U.S.C. § 701(a).

[8] Plaintiffs cite *Air Courier Conference of America v. American Postal Workers Union,* 498 U.S. 517, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991), for the proposition that 39 U.S.C. § 410(a) is not jurisdictional. However, the *Air Courier* opinion did not decide whether Congress intended to exempt the Postal Service from APA claims. *Id.* at 523. Since this Court finds that Congress did so intend, claims under the APA fail for the reason that sovereign immunity as to those claims has not been waived.

Alternatively, even if this Court assumes it has jurisdiction over the APA claims, these would be dismissed for failure to state a claim upon which relief can be granted since Congress clearly did not intend to create a cause of action against the Postal Service under the APA. Plaintiffs' contention that defendants have waived this affirmative defense has no merit. Defendants' answer clearly states that "plaintiffs have failed to state a claim upon which relief can be granted." (Answer at 2.)

claims. Therefore, all claims under the APA are dismissed for want of subject matter jurisdiction.[9]

However, the Court finds that Congress did waive the Postal Service's immunity to expose it to claims under 39 U.S.C. § 403(c). That statute mandates that "in providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user." The Court finds that jurisdiction over claims asserted under this statute is valid. This is not a situation where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney,* 470 U.S. 821, 830, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). Here, we have an express prohibition.[10] Just

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[9] Given the clear Congressional mandate, this holding is the same when the Court considers the effect of 39 U.S.C. § 409(a), 28 U.S.C. § 1331 or 28 U.S.C. § 1339. *See infra* note 7.

[10] Even if the Court were to apply the four-part test articulated by the Supreme Court in *Cort v. Ash,* 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975) rather than rely on the express wording of the statute, it would still find that there is an implied right of action. The Court finds that the statute was enacted to protect users such as the plaintiffs who filed this lawsuit. The language of the statute indicates that even though Congress wanted the Postal Service to become an efficient business, it did not want to allow it to engage in unreasonable discrimination. A right of action based on unreasonable or undue discrimination is therefore consistent with the overall purpose of the legislation. Finally, postal matters are and have "always been a federal concern." *Morris v. Runyon,* 870 F. Supp. 362, 371 (D.D.C. 1994). This is not a situation where "the plain language of the provision weighs against implication of a private remedy." *Touche Ross & Co. v. Redington,* 442 U.S. 560, 571, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979).

as this Court respects Congress' intent to create an efficient Postal Service, it will also defer to Congress' wish, as expressed in the statute, to bar unreasonable discrimination among the Postal Service's consumers.[11]

The Court holds that subject matter jurisdiction over claims arising under 39 U.S.C. § 403(c) is proper.[12]

Finally, the Court holds that it also has jurisdiction over claims brought under the Constitution. As the Supreme Court clarified in *FDIC v. Meyer,* even if Congress declares that an agency is to be run like a private enterprise and, as such, exempts it from certain causes of action, this does not grant immunity from constitutional claims. *See Meyer,* 510 U.S. at 483. In that case, the Court held that sovereign immunity with respect to constitutional torts was waived under the Federal Savings and Loan Insurance Corporation's sue and be sued clause. *See id.* The Fourth Circuit Court of Appeals, which considered the effect of the *Meyer* decision on the Postal Service, held

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[11] It should be noted that federal courts have not shut the door on jurisdictional grounds to actions brought against the Postal Service under 39 U.S.C. § 403(c) by competitors, *see UPS Worldwide Forwarding, Inc. v. Postal Service,* 66 F.3d 621 (3rd Cir. 1995); corporate customers, *see Direct Mail/Marketing Ass'n, Inc. v. Postal Service,* 163 U.S. App. D.C. 157, 501 F.2d 717 (D.C. Cir. 1974); *Aimes Publication, Inc. v. Postal Service,* 1988 WL 19618 (D.D.C. 1988) and non-corporate customers *Egger v. Postal Service,* 436 F. Supp. 138 (D.C. Va. 1977). *But see Shelby Resources Inc. v. Postal Service,* 619 F. Supp. 1546 (S.D. N.Y. 1985); *Tedesco v. Postal Service,* 553 F. Supp. 1387 (W.D. Pa. 1983); *Unicover Corp. v. Postal Service,* 859 F. Supp. 1437 (D. Wyo. 1994).

[12] Implicit in this holding is the Court's disagreement with the Postal Service's contention that plaintiffs' only recourse in challenging some of the regulations is to follow the requirements of 39 U.S.C. § 3628, a statute that details how decisions of the governors of the Postal Service may be subjected to review.

that it serves to expand liability. *See Global Mail Limited v. Postal Service,* 142 F.3d 208, 213 (4th Cir. 1998) (noting that "*Meyer* does explain that the [Federal Tort Claims Act ('FTCA')] does not serve as the only means by which a federal agency can be sued in tort, and that torts that are not cognizable under the FTCA still may be the sources of appropriate claims"). It should also be noted that forcing the Postal Service to answer to claims under the Constitution is consistent with the Service's public character. The Court has jurisdiction over claims asserted under the Constitution.[13]

C. FIRST AMENDMENT CLAIMS

Plaintiffs' First Amendment claims are based on two policies of the Postal Service. Plaintiffs claim their First Amendment rights are violated when the Postal Service refuses to provide no-fee postal boxes to "otherwise eligible" homeless people because this policy "unduly restricts plaintiffs' ability to receive and send mail." (Compl. ¶ 78.) Similarly, the fact that General Delivery is provided only at the Main Post Office in downtown Seattle rather than at various locations serving city neighborhoods where the plaintiffs are situated is also said to impinge on plaintiffs' First Amendment rights. (Compl. ¶ 81.)

In the Postal Service's motion to dismiss, it claims that plaintiffs do not articulate a constitutional claim

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[13] Even under *Meyer,* a federal agency can overcome the presumption of reviewability under the Constitution. However, the Court holds that the Postal Service has not met this burden. The Postal Service explains how the plaintiffs' cause of action under the Constitution would fail. This analysis goes to the merits of the constitutional tort claim and not to the jurisdictional analysis.

because the regulations do not "deprive [plaintiffs] of a meaningful opportunity to receive mail." (Defendants' Mot. at 20.) Therefore, its regulations should be subject to a minimal level of scrutiny, which, the Postal Service claims, they can easily withstand.

In considering the defendants' motion to dismiss, all factual allegations in the complaint will be assumed to be true and construed in the light most favorable to plaintiffs. *See e.g., Fireman's Fund Ins. Co. v. City of Lodi,* 271 F.3d 911, 923-24 (9th Cir. 2001). The Court agrees with the plaintiffs that the right to receive mail is a fundamental right. *See, e.g., Lamont v. Postmaster General,* 381 U.S. 301, 307, 14 L. Ed. 2d 398, 85 S. Ct. 1493 (1965). However, it is also true that there is no right to receive mail at the most convenient location; nor is there a right to receive a no-fee mailbox in which to receive mail. These services require subsidies by the Postal Service and the Supreme Court has "rejected the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 546, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) (quoting *Cammarano v. United States,* 358 U.S. 498, 3 L. Ed. 2d 462, 79 S. Ct. 524 (1959)). This is not a situation where the Postal Service is alleged to have engaged in censorship or restricted certain types of content. In those cases, a strict scrutiny analysis suggested by plaintiffs may well be applicable. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.,* 502 U.S. 105, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991). However, the Postal Service's operational regulations are subject to a lower level of constitutional scrutiny. *See United States v. Kokinda,* 497 U.S. 720, 725, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990). They are required to

be reasonable and content-neutral. *See Postal Service v. Council of Greenburgh Civic Associations,* 453 U.S. 114, 131 n.7, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981). The Court finds that the regulations of the Postal Service reasonably advance Congressionally-mandated goals of delivering mail efficiently and economically. The Postal Service could reasonably determine, as it states it has, that it cannot provide no-fee postal boxes in certain areas economically or that General Delivery by zip code in large cities does not justify the cost or the operational problems it creates.[14] (Dorsey Decl. ¶¶ 8-10.) Moreover, the regulations at issue are clearly content-neutral. The Court finds that the Postal Service has provided more than the constitutionally-required "conceivable basis" for the proposition that its regulations satisfy a legitimate governmental interest. *Cf. National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology,* 228 F.3d 1043, 1051 (9th Cir. 2000). Therefore, plaintiffs' First Amendment claims shall be dismissed.

D. EQUAL PROTECTION CLAIMS

Plaintiffs claim that the Postal Service violates the Equal Protection component of the Due Process clause of the Fifth Amendment when it impermissibly discriminates against the homeless by failing to provide them no-fee postal boxes even as it provides these to others who are "similarly situated." (Compl. ¶ 77.) Plaintiffs also claim that the Postal

[14] Similarly, the stricter requirements imposed by the Postal Service since October, 2001 for those without physical addresses do not create constitutional violations. *See infra* p. 2. As the Postal Service has pointed out, the issue of security partly drove the promulgation of the new regulations. This is an eminently reasonable and rational concern.

Service impermissibly refuses to provide General Delivery service to the zip codes within which the homeless reside when most of the Postal Service's other customers get mail delivered by carriers or at their neighborhood post offices. (Compl. ¶ 80.)

The Court agrees with the Postal Service that the plaintiffs' Equal Protection claims should be dismissed. As the Court has already noted, a constitutional right is not being impinged since plaintiffs are able to rent postal boxes or get General Delivery in accordance with Postal Service regulations.[15] Therefore, the constitutional standard applicable here is "whether the challenged ... action rationally furthers a legitimate state purpose or interest." *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 55, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973). "There need not be a tight fitting relationship between the legislative goal and the result. All that is needed to uphold the ... classification scheme is to find that there are plausible, arguable, or conceivable reasons which may have been the basis for the distinction." *Jackson Water Works, Inc. v. Public Utilities Com'n of State of Cal.,* 793 F.2d 1090, 1094 (9th Cir. 1986) (internal citations and quotations omitted). The Court finds that the Postal Service has met this standard. First: The distinction between customers who receive no-fee postal boxes and those that don't is reasonable. The relevant postal regulations that govern the no-fee boxes make it clear that only residents who have a physical residence or a business location at a fixed delivery point are eligible for the Group E

[15] The Postal Service is not engaging in improper classifications, such as those by race or gender, that would trigger a heightened level of scrutiny. The plaintiffs concede that their Equal Protection claim rests on the allegation that a fundamental right is being violated or impinged. (Plaintiffs' Resp. at 17.)

Rate program. (Dorsey Decl. Ex. B, Postal Bulletin 21975.) The Group E Rate service is grounded in rational considerations of eliminating the disparity of service between "those customers *with fixed home or business locations* to which the Postal Service provides carrier delivery service and those to which carrier delivery service is not provided for some operational reason." (Dorsey Decl. ¶ 9) (emphasis added). Just because the Postal Service chose to minimize certain disparities does not mean that it is required to eliminate them all, particularly between people who are not similarly situated. Second: As the Postal Service makes clear, General Delivery is an expensive option that requires a transaction with a person at a counter. (Dorsey Decl. ¶ 8.) Providing this service at all 32 Seattle locations has the potential to increase costs as well as to complicate investigations of illegally shipped material. (Decl. of Eugene Broom ¶ 6.) The Postal Service could reasonably decide to provide this service only at one branch in a jurisdiction. The Court finds that constitutional requirements are amply met. Therefore, plaintiffs' Equal Protection claims should be dismissed.

E. 39 U.S.C. § 403(C) CLAIMS

Under 39 U.S.C. § 403(c), "in providing services and in establishing classifications, rates, and fees . . . the Postal Service shall not . . . make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user." 39 U.S.C. § 403(c). The Postal Service has chosen to restrict its opposition to plaintiffs' claims under this statute to allegations of lack of jurisdiction. As the Court has held above, it does retain jurisdiction over such claims. However, under the explicit language of the statute, "*reasonable* discrimination and preferences among users of the mail are permitted." *UPS Worldwide Forwarding, Inc.*

v. Postal Service, 66 F.3d 621, 634 (3rd Cir. 1995) (emphasis added). The Court holds that under the facts of this case, the statute does not impose upon the Postal Service a higher standard than that demanded by the Constitution. Since the regulations have a rational relationship with the legitimate goals of providing efficient and economical service and have satisfied constitutional concerns, this Court finds that the requirements of 39 U.S.C. § 403(c) are met. Therefore, claims under the statute shall be dismissed *sua sponte. Cf. Omar v. Sea-Land Service, Inc.,* 813 F.2d 986, 991 (9th Cir. 1987) (holding that "[a] trial court may dismiss a claim *sua sponte* under Fed.R.Civ.P. 12(b)(6) . . . where the claimant cannot possibly win relief").

CONCLUSION

For the foregoing reasons, plaintiffs' claims against individual defendants shall be dismissed. Plaintiffs' claims arising under Postal Service regulations and the Administrative Procedure Act shall be dismissed for lack of subject matter jurisdiction. Plaintiffs' claims that arise under 39 U.S.C § 403(c) and the Constitution shall be dismissed for failure to state claims upon which relief can be granted.

Defendants' motion to dismiss is therefore GRANTED. The Clerk of the Court is directed to enter a judgment in favor of defendants.

DATED this 30th day of January, 2002.

Robert S. Lasnik

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARL A. CURRIER, et al., Plaintiffs, v. WILLIAM J. HENDERSON, et al., Defendants.	Case No. C01-0156L ORDER DECLARING MOTION FOR PRELIMINARY INJUNCTION MOOT (Filed Jan. 30, 2002)

This matter comes before the Court on plaintiffs' motion for a preliminary injunction. The Court has dismissed plaintiffs' claims. Therefore, plaintiffs' motion for a preliminary injunction (Dkt. # 33) is declared MOOT.

DATED this 30th day of January, 2002.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARL A. CURRIER, et al., Plaintiffs, v. WILLIAM J. HENDERSON, et al., Defendants.	Case No. C01-0156L ORDER DECLARING MOTION FOR CLASS CERTIFICATION MOOT (Filed Jan. 30, 2002)

This matter comes before the Court on plaintiffs' motion for class certification. The Court has dismissed plaintiffs' claims. Therefore, plaintiffs' motion for class certification (Dkt. # 9) is declared MOOT.

DATED this 30th day of January, 2002.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BAR; WILLARD JOHNSON; SEATTLE HOUSING AND RESOURCE EFFORT, a Washington non-profit corporation, individually and on behalf of others similarly situated,

Plaintiffs-Appellants,

v.

JOHN E. POTTER,* Postmaster General of the United States, individually and in his official capacity; DALE E. ZINSER, Seattle District Manager of the United States Postal Service, individually and in his official capacity; UNITED STATES POSTAL SERVICE,

Defendants-Appellees.

No. 02-35232

D.C. No. CV-01-00156-RSL

ORDER

(Filed Nov. 17, 2004)

Before: O'SCANNLAIN, GOULD, Circuit Judges, and BOLTON,** District Judge.

A majority of the panel has voted to deny the petition for rehearing en banc. Judges O'Scannlain and Bolton

* Pursuant to FED. R. APP. P. 43(c)(2), John E. Potter is substituted for his predecessor, William J. Henderson.

** The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

have voted to deny the petition. Judge Gould voted to grant the petition.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. FED. R. APP. P. 35.

The petition for rehearing en bane is therefore DENIED.

APPENDIX F

[LOGO]

December 29, 2000

In the Matter of the Petitions by

CARL A. CURRIER

Refusal to Provide Post Office
Box or General Delivery Service
P.S. Docket No. POB 00-209

JAMES KERNS

Refusal to Provide Post Office
Box or General Delivery Service
P.S. Docket No. POB 00-271

DAVID BAR

Refusal to Provide Post Office
Box or General Delivery Service
P.S. Docket No. POB 00-272

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Washington, DC 20260-1127

INITIAL DECISION

This proceeding arises from Petitions filed by Mr. Currier, Mr. Kerns, and Mr. Bar, after they were orally denied post office box service.

In each case, Respondent, the United States Postal Service, filed a Motion for Summary Judgment, arguing that there were no material facts in dispute and that Respondent was entitled to judgment as a matter of law. Petitioners replied with cross-motions for summary judgment. As they are based on similar facts, and raise the same issues, the cases have been consolidated for decision. The following findings of fact are based on all the material submitted by the parties.

FINDINGS OF FACT

1. All three Petitioners are homeless men living in Seattle, WA. In May and June 2000, each of them separately approached postal employees at various Seattle post offices to inquire about post office box service. They each asked about regular post office boxes, "no-fee" post office boxes, and general delivery service. Each made it clear to the postal employees they talked with that they were homeless. (Petitions; Currier Declaration; Bar Declaration; Kerns Declaration (all attached to Petitioners' M/SJ); Merkel Declaration (attached to Respondent's M/SJ)).

2. Each Petitioner was orally denied post office box service. None actually filled out a written application for a post office box (PS Form 1093, see Petitioners' M/SJ, Tab L).[1] Each also was given information about the availability of general delivery service at the Seattle Main Post Office. One or more may have been given incorrect information, i.e., that there was a 30-day limit on that service, but this matter is now moot. All Petitioners were informed early on in this litigation that general delivery service was available to them indefinitely. (Petitions; Answers; Zinser Declaration; Green Declaration).

3. Mr. Currier showed one of the postal employees with whom he spoke a photo identification card from the Downtown Emergency Services Center (DESC) but told her he did not wish to use the DESC address as his address in applying for a box (Currier Declaration; Merkel Declaration). Mr. Bar and Mr. Kerns also possess certain identification cards but, as no postal employee who remembers talking to them has been located, it is unclear whether they actually presented these identification cards. The identification cards possessed by all three Petitioners are attached to Petitioners' Motion for Summary Judgment (Bar Declaration; Kerns Declaration; M/SJ, Tabs G, H, I).

4. All three Petitioners were told that they could not obtain a post office box without providing a physical address on their application, or words to that effect. It is not necessary to determine precisely what they were told, or whether the postal employees with whom they spoke correctly stated the rules on eligibility for post office box service. There is no doubt that the three Petitioners were denied box service, and the Postal Service position on their lack of entitlement has been made clear in this litigation.

5. The following provisions of the Domestic Mail Manual (DMM, Issue 55) are pertinent:

D910 Post Office Box Service

Purpose Post office box service is a premium service offered for a

1.1 fee to any customer requiring more than free carrier delivery or general delivery and for no fee to customers who are not eligible for carrier delivery. . . .

Proof of Physical Address

2.3 An applicant for post office box service, . . . , or a current box customer seeking renewal must identify his or her physical address (i.e., an individual's residence or a business's location) to the postmaster of the office where service is sought or provided. . . .

5.0 FEE GROUP ASSIGNMENTS

5.1 a. *Post Office With City Delivery*. . . . A customer whose physical residence or business location is within the geographic delivery ZIP Code boundaries administered by that city delivery office, who is ineligible for any form of carrier delivery service from the post office, and who does not receive carrier delivery via an out-of-bounds delivery receptacle may obtain post office box service through one box of the smallest available size that accommodates the customer's mail volume at the Group E fee.[2]

D930 General Delivery and Firm Holdout

1.0 General Delivery

Purpose 1.1 General delivery is intended primarily as a temporary means of delivery:

a. For transients and customers not permanently located.

b. For customers who want post office box service when boxes are unavailable.

Service Restrictions General delivery is available at only one facility under the administration of a multifacility post office. . . .

1.2

6. The following Postal Bulletin provision is pertinent (PB 21877, 9-29-94):[3]

> **Post Office Box and General Delivery Service for Persons with No Fixed Address**
>
> In an effort to assist persons with no fixed address, a homeless person's application for post office box service (Form 1093) may be approved under any one of the following conditions:
>
> 1. The applicant is personally known to the post-master or clerk.
>
> 2. An unknown applicant submits proper identification such as a valid driver's license or other credential showing the applicant's signature and a serial number, or other indicia that can be traced to the bearer.
>
> 3. The applicant provides a verifiable point of contact, e.g., place of employment, shelter, charitable institution, or social service office.

> Applicants who cannot meet these conditions may receive indefinite general delivery service as provided in *Domestic Mail Manual* (DMM) D930. . . .

7. General delivery mail service in Seattle is provided only at the Seattle Main Post Office, Third and Union Streets. (Zinser Declaration; Nelson Declaration) Group E (no-fee) post office box service is not offered at all in Seattle, and no customers, homeless or otherwise, receive no-fee box service. (Zinser Declaration filed in *Bar* and *Kerns* cases)

8. The following excerpts from statues governing the Postal Service are pertinent:

> **39 U.S.C. §101. Postal Policy**
>
> (a) . . . The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. . . .
>
> **39 U.S.C. §401. General powers of the Postal Service**
>
> * * *
>
> (2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;
>
> * * *
>
> (10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

39 U.S.C. §403. General duties

(b) It shall be the responsibility of the Postal Service –

(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users;

* * *

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among the users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

39 U.S.C. §404. Specific powers

(a) Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:

(1) to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of the mail, and for the disposition of undeliverable mail:

* * *

39 U.S.C. §3621 Authority to fix rates and classes

. . . Postal rates and fees shall be reasonable and equitable and sufficient to enable the Postal

> Service under honest, efficient, and economical management to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States. . . .

DECISION

A grant of summary judgment is proper when there are no issues of material fact in dispute and when, as a matter of law, the moving party is entitled to judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In this case, both parties have moved for summary judgment. There are no material facts in dispute and summary judgment is appropriate.

Petitioners argue that Respondent has not followed its own regulations in denying post office box service to Petitioners. Specifically, Petitioners argue that DMM §D910.5.1(a) (see Finding of Fact #5) creates an entitlement to no-fee boxes for homeless persons, and that Respondent has failed to follow this regulation.[4] Petitioners also argue that they qualify for post office box service under the Postal Bulletin 21877 provision for homeless persons, but that Respondent continues to insist that every applicant must provide a physical address.

Petitioners also make two Constitutional arguments. First, they argue that Respondent's application of its rules on no-fee post office boxes unreasonably discriminates against homeless persons in violation of the Equal Protection clause of the Fifth Amendment. Second, they argue that providing general delivery service at only one location in the city of Seattle unlawfully infringes upon the First Amendment rights of homeless persons.

Most of Respondent's arguments in the motions for summary judgment are directed toward the general delivery rules and the rules governing no-fee post office boxes. As noted earlier (see Finding of Fact #2), part of the first issue is now moot because the Postal Service acknowledges that there is no time limit on Petitioners' entitlement to general delivery service. As to the fact that general delivery is available only at the Seattle Main Post Office, Respondent argues that this is in accordance with the governing regulation, DMM §D930.1.2 (see Finding of Fact #5). Further, Respondent argues that this regulation is a reasonable exercise of the Postal Service's authority under its statutory responsibility for providing an efficient nationwide mail delivery system, citing 39 U.S.C. §403.

On the matter of no-fee post office boxes, Respondent argues that the provision of the DMM relied on by Petitioners, DMM §D910.5.1(a), was not intended to apply to homeless persons. Respondent argues that this provision applies only to customers who would be able to receive carrier delivery at a "physical residence or business location" but for a Postal Service decision not to provide carrier delivery. Because homeless persons do not have a physical residence or business location, Respondent's position is that they are not within the scope of this regulation. Respondent argues that this is a reasonable interpretation of the DMM provision and is entitled to judicial deference under the general rule that an agency's interpretation of its own rules will not be overturned by a court unless such interpretation is arbitrary, capricious, or unreasonably discriminatory.

As to the rules stated in Postal Bulletin 21877 (Finding of Fact #6), it does not appear that any of the Petitioners actually applied for a post office box on the basis of those

rules, or that any postal employee evaluated their eligibility under those rules, although some Seattle employees stated that they were aware of those rules. (Zinser Declaration and March 14, 2000 memo; Martin Declaration; Witherspoon Declaration-all attached to Respondent's M/SJ in *Kerns* case; Atkins Declaration; Chi Declaration; Wou Declaration-all attached to Respondent's M/SJ in *Bar* case).

In its motions for summary judgment, Respondent characterizes the Postal Bulletin 21877 provision as providing "alternate methods of providing proof of a physical address," and also as permitting homeless persons to obtain a box "upon a relaxed showing of physical address and identity." (Respondent's M/SJ, ¶39; Estes Declaration, ¶3). Without ever specifically stating that the various identification cards filed by Petitioners do not meet the standards found in Postal Bulletin 21877, Respondent states in its motions for summary judgment that, "[I]n order to be eligible for post office box service, an applicant must have a verifiable physical address," citing DMM §D910.2.3. (Respondent's M/SJ, ¶37).

Entitlement to no-fee post office boxes

The issue here is whether Respondent's interpretation of DMM §D910.5.1(a) is reasonable, or whether the language of that regulation creates a clear and unambiguous entitlement to no-fee box service for Petitioners. Petitioners argue that the latter is correct and, therefore, no deference should be given to Respondent's interpretation because no "interpretation" of a clear and unambiguous rule is necessary.

Three general principles are applicable here. First, if a statute requires some interpretation, courts will grant deference to an agency's construction of the statute in the agency's implementing regulations unless the agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984). Second, an agency must abide by its own regulations. *Morton v. Ruiz*, 415 U.S. 199, 235 (1976); *Harmon v. Brucker*, 355 U.S. 579, 583 (1958); *Orengo Caraballo v. Reich*, 11 F.3d 186, 193 (D.C. Cir. 1993). Third, courts will defer to an agency's interpretation of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150-51 (1991); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The Postal Service has been given broad authority, under the statutes quoted above (see finding of Fact #8), to establish rules and policies for the delivery of mail. This includes providing different methods of delivery service to different mail users. *Ludewig v. Wolff*, 492 F. Supp. 1048 (S.D. Tex. 1980); *Egger v. United States Postal Service*, 436 F. Supp. 138 (W.D. Va. 1977); *Grover City v. United States Postal Service*, 391 F. Supp. 982 (C.D. Cal. 1975).

I find that the Postal Service's interpretation of its regulation on eligibility for no-fee post office boxes (DMM §D910.5.1) is reasonable, and that it does not unduly discriminate against homeless persons. The sentence beginning, "[A] customer whose physical residence or business location," is reasonably read to apply only to customers who actually have a "physical residence or

business location" within a particular delivery area, but for whom the Postal Service has chosen not to provide carrier service. Petitioners' reading of this provision as creating an absolute entitlement to a no-fee box for any person who is ineligible for carrier delivery is overbroad and inconsistent with other rules. The special provision for homeless persons in Postal Bulletin 21877 would be meaningless if all homeless persons were entitled to no-fee boxes simply because they had no fixed address.

Petitioners' argument that the Postal Service has changed its interpretation of the rule on no-fee boxes and, therefore, is entitled to no deference as to the current interpretation, is also unpersuasive. It is true that the Postal Service has modified its rule on entitlement to no-fee boxes, see Petitioners' M/SJ, Tab F, but I find nothing in the record that shows a changed position on the particular provision that is in issue here. The change to the so-called "quarter-mile rule" still dealt with persons who had a residence or business address to which mail could be delivered, but to whom the Postal Service did not provide carrier delivery.

Petitioners are not entitled to no-fee post office box service.

General delivery at only one location

The regulation on this subject, DMM §D930.1.2 (see Finding of Fact #5), is very clear. Petitioners argue, however, that requiring people to spend time and money to travel to an inconvenient location, in this case the Seattle Main Post Office, unlawfully restricts their First Amendment right to free speech.

No one can quarrel with Petitioners' assertion that use of the mail is protected by the First Amendment, or that all persons have a right to have access to the United States mail system. Most of the cases cited by Petitioners, however, involved restrictions, direct or indirect, on the right to mail certain materials based on the content of that material, not on a Postal Service rule or policy that simply made use of the mail system less convenient. For example, Petitioners cite *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980), for the proposition that "the preservation of scarce financial resources is not an adequate rationale for a Postal Service regulation that infringes on First Amendment rights."[5] The full statement in that court's opinion, however, is that "the preservation of scarce financial resources has not provided a rationale for government activity that favors certain persons or groups and disfavors others on the basis of the content of the speech or the popularity of the speaker." *Greenberg*, at 776. The rule in question in this case has nothing at all to do within the content of the mail or the identity of customers.

Assuming that there might be facts that could create a First Amendment violation based on inconvenience (see discussion in *Shane v. Buck*, 658 F. Supp. 908, 915-18 (D. Utah 1985, *aff'd per curiam* 817 F.2d 87 (10th Cir. 1987)), I do not find that such facts exist here. Respondent's rationale for the one-location rule for general delivery mail, as stated in the Declarations of Mr. Zinser, Ms. Estes, and Mr. Nelson, is based on the need to accommodate automated mail processing and the overall goal of meeting the statutory obligation to provide efficient mail delivery service nationwide at a reasonable cost. The rule in DMM §D930.1.2 is consistent with that obligation. *Ludewig v. Wolff, supra*; *Egger v. United States Postal*

Service, supra; *Grover City v. United States Postal Service, supra.*

Further, neither an Administrative Law Judge nor the Judicial Officer has authority to declare a Postal Service regulation unconstitutional. *Fred Cherry*, Postal Service Docket No. POB 99-71 at 3 n.6 (P.S.D. July 16, 1999); *Sunday School Board of the Southern Baptist Convention*, Postal Service Docket No. SCD 97-192 at 4 n.9 (P.S.D. July 16, 1998); *David Sellers*, Postal Service Docket No. 37/153 at 4-5 (P.S.D. August 17, 1993). In this case, an Administrative Law Judge is bound to follow DMM §D930.1.2 as written.

Respondent is not required to provide general delivery service at locations other than the Seattle Main Post Office.

Eligibility under Postal Bulletin 21877

The issue here is whether the identification cards possessed by Petitioners, and which are attached to Petitioners' motion for summary judgment at Tabs G, H, and I, satisfy "any one" of the three criteria listed in Postal Bulletin 21877 (see Finding of Fact #6). I find Respondent's characterization of this Postal Bulletin provision as only providing "alternate methods of providing proof of a physical address," to be inaccurate. The Postal Bulletin rule requires no proof of a physical address at all if an applicant meets either of the first two criteria. The first criterion does not apply here, as there is no evidence that any of the Petitioners are personally known to the postmaster or to any of the clerks with whom they spoke.

Qualification under the second criterion depends on what constitutes "proper identification." The Postal Bulletin provision refers to a driver's license "or other credential," and there is no reference to more than one form of identification, so it must be assumed that one form of identification is sufficient. The provision then states that the credential must show "the applicant's signature and a serial number, or other indicia that can be traced to the bearer." This is the same language found in the DMM rule for regular post office box applications.[6]

Mr. Currier

Mr. Currier's identification card (Tab G) includes a photograph, a date of birth, an ID number, and the address of the Downtown Emergency Service Center. As the postal clerk with whom he spoke implied, Mr. Currier could have qualified for a post office box under the third criterion of Postal Bulletin 21877 if he had used that address as a point of contact. He declined to do so. The identification card does not meet the requirements of Postal Bulletin 21877, paragraph 2, however, because it contains no signature. Perhaps this is something that is correctable, but Respondent's decision to deny Mr. Currier a post office box is sustained and his Petition is denied.

Mr. Kerns

Mr. Kerns' identification card (Tab I) includes a photograph, a signature, the address of Seattle Central Community College, and a bar code that I assume equates to a personal identification number. This identification card meets the requirements of Postal Bulletin 21877, paragraph 2. On that basis, Mr. Kerns' Petition is sustained.

Mr. Bar

Mr. Bar's two identification cards (Tab H) both include a photograph, a birth date, and a signature. One also includes a social security number, and the other includes an identification number. These identification cards meet the requirements of Postal Bulletin 21877, paragraph 2. On that basis, Mr. Bar's Petition is sustained.

Bruce R. Houston

Chief Administrative Law Judge

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[1] Petitioners complain that they were given no written determination by a postmaster, as postal regulations call for, but any procedural issued in that regard is moot. Their Petitions were accepted and answered and the relevant issues have been joined. No harm came to any of the Petitioners from the fact that there were no written applications or written denials.

[2] Group E is the no-fee service (Respondent's M/SJ, 18; Estes Declaration).

[3] This Postal Bulletin item constitutes an announcement of official Postal Service policy. (39 C.F.R. §111.3(c); Respondent's M/SJ 12; Estes Declaration). It is found in the case file as an attachment to Green Declaration (Respondent's M/SJ), and with Petitioners' M/SJ at Tab J.

[4] Petitioners do not contend that the Postal Service must construct enough new boxes so that all homeless persons can have one, only that homeless persons have the same entitlement to no-fee boxes as any other person when boxes are available.

[5] Petitioners' Brief, p. 32.

[6] DMM §D910.2.2.

APPENDIX G

[LOGO]

January 19, 2001

In the Matter of the Petitions by

CARL A. CURRIER

Refusal to Provide Post Office Box or General Delivery Service — P. S. Docket No. POB 00-209

JAMES KERNS

Refusal to Provide Post Office Box or General Delivery Service — P. S. Docket No. POB 00-271

DAVID BAR

Refusal to Provide Post Office Box or General Delivery Service — P. S. Docket No. POB 00-272

ORDER

On December 29, 2000, an Administrative Law Judge issued an Initial Decision granting the Petitions of James Kerns and David Bar and denying the Petition of Carl A. Currier. No appeal from the Initial Decision having been filed within the time allowed, that Decision is now the Final Agency Decision of the Postal Service as provided in 39 C.F.R. §958.9.

James A. Cohen
Judicial Officer

APPENDIX H

[Code of Federal Regulations]
[Title 39, Volume 1]
[Revised as of July 1, 2001]

From the U.S. Government Printing Office via GPO Access

[CITE: 39 C.F.R. 3001]

Appendix A to Subpart C – Postal Service Rates and Charges

2027 Held Mail. Mail will be held for a specified period of time at the office of delivery upon request of the addressee, unless the mail:

a. Has contrary retention instructions;

b. Is perishable; or

c. Is registered, COD, insured, return receipt, certified, or Express Mail for which the normal retention period expires before the end of the specified holding period.

APPENDIX I

39 C.F.R. § 958.9 Initial decision.

Unless given orally at the conclusion of the hearing, the Administrative Law Judge shall render an initial decision as expeditiously as practicable following the conclusion of the hearing, and the receipt of the proposed findings, if any. The initial decision shall become the final agency decision if a timely appeal is not taken.

APPENDIX J

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX K

28 U.S.C. § 1339. Postal matters

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

APPENDIX L

39 U.S.C. § 409. Suits by and against the Postal Service

(a) Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28 [28 U.S.C. §§ 1441 et seq.].

APPENDIX M

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 U.S.C. §§ 1292(c) and (d) and 1295].

APPENDIX N

U.S. Const. Amend. I (2004)

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX O

39 U.S.C. § 101. Postal policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the over-all value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

APPENDIX P

39 U.S.C. § 403. General duties

(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service –

(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

APPENDIX Q

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX R

U.S. Sup. Ct. R. 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPENDIX S

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARL A. CURRIER, DAVID BAR, WILLARD JOHNSON, and SEATTLE HOUSING AND RESOURCE EFFORT (SHARE), a Washington non-profit corporation, individually and on behalf of all others similarly situated, Plaintiffs, v. WILLIAM J. HENDERSON, Postmaster General of the United States, individually and in his official capacity, DALE R. ZINSER, Seattle District Manager of the United States Postal Service, individually and in his official capacity, and the UNITED STATES POSTAL SERVICE, Defendants.	Judge Robert S. Lasnik NO. C01-0156L **ANSWER**

* * *

53. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 53 of the Complaint, therefore deny said allegations.

54. Defendants admit that on or about January 24, 2001 plaintiff Johnson applied for a postal box at the Columbia Station located at 3727 South Alaska Street, Seattle Washington. Defendants lack sufficient information to form a belief as to the truth of the remaining

allegations contained in Paragraph 54 of the Complaint, therefore deny said allegations.

55. Defendants admit the allegations contained in Paragraph 55 of the Complaint.

56. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 56 of the Complaint, therefore deny said allegations.

57. Defendants admit the allegations contained in Paragraph 57 of the Complaint.

58. Defendants admit that plaintiff Johnson received a receipt for the form 1093. Defendants lack sufficient information to form a belief as to the truth of the remaining allegations contained in Paragraph 58 of the Complaint, therefore deny said allegations.

59. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 59 of the Complaint, therefore deny said allegations.

60. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 60 of the Complaint, therefore deny said allegations.

61. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 61 of the Complaint, therefore deny said allegations.

62. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 62 of the Complaint, therefore deny said allegations.

63. Defendants admit that the Main Post Office is the only location within the Seattle Postal area where general delivery services are available. Defendants deny

that any plaintiff or other homeless person is restricted to a day limitation on the right to utilize general delivery. Except as expressly admitted herein, the allegations in Paragraph 63 of the Complaint are denied.

64. Defendants deny the allegations contained in Paragraph 64 of the Complaint. By way of further answer, Defendants aver that no Postal customer in the City of Seattle receives or is entitled to no-fee box service.

65. Defendants deny the allegations contained in Paragraph 65 of the Complaint.

66. Defendants deny the allegations contained in Paragraph 66 of the Complaint.

67. Defendants deny the allegations contained in Paragraph 67 of the Complaint.

68. Defendants deny the allegations contained in Paragraph 68 of the Complaint.

69. Defendants admit that general delivery service is available only at one location in the City of Seattle. Except as expressly admitted herein, each and every allegation contained in Paragraph 69 of the Complaint is denied.

70. Defendants admit that individuals who lack a "fixed delivery point" are not eligible for carrier service. Except as expressly admitted herein, each and every allegation contained in Paragraph 70 of the Complaint is denied.

71. Defendants deny the allegations contained in Paragraph 71 of the Complaint.

72. Defendants deny the allegations contained in Paragraph 72 of the Complaint.

73. Defendants admit that the Chief Administrative Judge of the Office of the Judicial Officer issued a decision on December 29, 2000, and that a true and correct copy of that decision is attached to the Complaint as Ex. A. Defendants deny that the decision improperly or incorrectly denied any benefit to any person. Except as expressly admitted herein, Defendants deny each and every remaining allegation contained in Paragraph 73 of the Complaint.

74. Defendants admit the allegations contained in Paragraph 74 of the Complaint.

VI. CLAIMS FOR RELIEF

75. To the extent the averments regarding the content of Section D910 of the Domestic Mail Manual are consistent with it's [sic] provisions, they are admitted. To the extent the averments regarding the content of Section D910 of the Domestic Mail Manual are inconsistent with it's [sic] provisions, they are denied. Except as expressly admitted herein, Defendants deny each and every remaining allegations contained in Paragraph 75 of the Complaint.

76. To the extent the averments regarding the content of Section D910 of the Domestic Mail Manual are consistent with it's [sic] provisions, they are admitted. To the extent the averments regarding the content of Section D910 of the Domestic Mail Manual are inconsistent with it's [sic]

* * *

APPENDIX T

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARL A. CURRIER, et al., Plaintiffs, vs. WILLIAM J. HENDERSON, et al., Defendants.	No. C01-01156 DECLARATION OF CARL A. CURRIER **CLASS ACTION**

(Filed May 02, 2001)

DECLARATION OF CARL A. CURRIER

Carl Al Currier declares:

1. I am 46 years old. I am homeless. I have been homeless off and on since 1962.

2. Because I am homeless and stay in emergency shelters, I have to move frequently and am never certain where or for how long I will be in one place. I have no permanent physical address. I generally live in Seattle, Washington.

3. On May 18, 2000 at about 10:15 AM, I went to the Pioneer Square Post Office in Seattle to apply for a Post Office Box and General Delivery mail service. I went to the clerk, told her I was homeless and first asked if I could get a Post Office Box.

4. She asked if I had any address that I could give her as a contact point, such as a mission. Since I am never certain where I'll be from one day to the next, I responded no. I explained to her that the reason that I needed a Post Office Box was because I am homeless and don't have my

own address. The clerk went to check with her supervisor, came back and said I couldn't get a Post Office Box, but could get General Delivery – but only if I went to the downtown Post Office at 3rd Avenue & Union Street. I asked her how long I would be able to receive General Delivery, but she said she didn't know.

5. At no time did the clerk offer me any forms or applications to fill out to get a post office box.

6. She did tell me that General Delivery would be free, so I asked if the Post Office Boxes were free or cost money. She said it cost $22 for 6 months, but that I still needed an address to be able to get a Post Office Box, because the Post Office must be able to mail me a letter and get a response to be able to initiate the process of getting the Post Office Box.

7. She said that if I got a joint Post Office Box with someone else that I could use their address to qualify for the Post Office Box. I told her that I had heard that homeless people could get a Post Office Box as long as they had proper identification, so I showed her my Downtown Emergency Service Center ("DESC") card. She asked me why I didn't use the DESC address to get a Post Office Box, so I explained that I don't stay at DESC and that I have had problems receiving mail there in the past, which is another reason why I was applying for a Post Office Box. She then told me that I still couldn't get a Post Office box – whether or not I had proper identification – because I would not list DESC as my address.

8. On May 22, 2000, I went into the post office at 3rd and Union to inquire about mail delivery. I asked the postal worker if I could get general delivery and the postal worker told me that I could get it for thirty days. I asked

about a free post office box and was told that they cost money. I was also told that I need a verifiable street address to qualify for a box.

9. I never received a written denial of my request for a post office box, my appeal rights, or indefinite General Delivery service. I never received a written explanation of why I couldn't get a Post Office Box or who to contact if I still thought I should receive a free post office box.

I certify under penalty of perjury under the laws of the 28 U.S.C. § 1756 that the foregoing statements are true and correct.

Dated June 6th, 2000

Seattle, King County, WA

/s/ Carl Al Currier
Carl A Currier

APPENDIX U

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID BAR, et al., Plaintiffs, vs. WILLIAM J. HENDERSON, et al., Defendants.	No. C01-0156 DECLARATION OF DAVID BAR **CLASS ACTION**

(Filed May 02, 2001)

DECLARATION OF DAVID BAR

David Bar declares:

1. I am 41 years old. I have been homeless since September, 1999. Because I am homeless I have no physical address where I can receive mail. I live in Seattle, Washington.

2. I have a sleep disorder called apnea. I need to keep in touch with my doctors through the mail.

3. I need to keep in touch with the Coast Guard so I can get information from them regarding "Able-bodied Seaman" for employment.

4. I used to be employed as an offshore worker. When I was doing that work, I had no home on shore. During this period, I applied several times for post office boxes in Louisiana, and was denied because I was unable to give a physical address to the post office.

5. On June 7, 2000 I went into the Post Office in Seattle's International District and asked the clerk if I could get a Post Office Box. The clerk told me that there were no Post Office Boxes available at the time,

but said I could fill out a form and be placed on a waiting list. The clerk said the Post Office would send me a letter when a Post Office Box became available.

6. I told the clerk that I was homeless and did not have an address to receive the letter.

7. The clerk said to be able to apply for a Post Office Box, I needed an address where I could be notified by mail of the approval or denial of my Post Office Box application.

8. I asked the clerk if I could get a free Post Office Box because I was homeless. He said no.

9. I asked if I could get a Post Office Box if I paid for it. He said it cost $22 for six months for a regular sized box and $32 a month for a larger box. He said I would still need a physical address so they could mail out an acceptance letter.

10. I asked about General Delivery and was told that they do not have General Delivery at that location. I was told to go to the Main Post Office, located at 301 Union Street, Seattle Washington, 98101.

11. I left the post office. At no time did the clerk tell me how I could appeal this decision, and I was never given a written denial.

12. On June 21, 2000, I went into the Main Post Office to inquire about a post office box. The postal clerk told me that I could not get one because I did not have a physical address.

13. The clerk (Mike) told me to go to a shelter and that I could use their address in order to get a post office box. I told the clerk that I did not want to go to a shelter and he said that there is nothing he could do.

14. I asked about a free post office box and was told that they cost money. I was also told that I needed a verifiable street address to qualify for a box.

15. I asked the postal worker if I could get general delivery. I was told that I could get it for thirty days. The clerk also said general delivery would be limited to personal mail and that I could not receive advertisements.

16. Again, I was not given a written notice of the denial of General Delivery mail services or a post office box. I was also not informed that I could appeal these denials.

I certify under the penalty of perjury under the laws of the 28 U.S.C. § 1756 that the foregoing statements are true and correct.

Dated June 21, 2000
Seattle, King County, Washington

/s/ David Bar
David Bar

APPENDIX V

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARL A. CURRIER, et al., Plaintiffs, v. WILLIAM J. HENDERSON, et al., Defendants.	CASE NO. C01-156L DECLARATION OF CHRISTOPHER MURRAY

Christopher Murray declares:

1. I am the sole proprietor of Christopher Murray & Associates, a business providing planning, policy analysis, and research to justice agencies since 1987. Between that date and the present I have done work for state and local justice agencies in Washington, Oregon, Idaho, California, Alaska, Wisconsin, Iowa, Virginia, West Virginia, and North Carolina.

2. From January 1997 to April 1998 along with Nayak Polissar, Ph.D., of The Mountain-Whisper-Light Statistical Consulting, and Merlyn Bell, of M.M. Bell, Inc., I conducted a study of misdemeanors and misdemeanor defendants in King County, Washington (The Misdemeanant Study) on behalf of King County, the City of Seattle, the Suburban Cities Association, and the Washington State Department of Corrections.

3. In 1995, there were more than 100,000 misdemeanor charges disposed of by courts of limited jurisdiction in

King County. Those charges were levied against 68,000 defendants and resulted in more than 320,000 misdemeanor jail days in facilities of the King County Department of Adult Detention.

4. The study found that, independent of any current charge or defendant criminal history, failure to appear at court hearings (FTA) and failure to comply with orders of the court (FTC) are important factors that affect decisions to incarcerate and the amount of time defendants remain in jail.

5. Failure to appear often has an adverse effect on individual defendants. First, FTA can increase the likelihood of an individual defendant getting a sentence of jail time. Second, failure to appear almost always results in the issuance of a warrant which, if served, will result in jail time. Third, failure to appear after sentencing can result in longer jail stays through revocation of suspended jail sentences.

6. For the 95 percent of sentenced misdemeanor defendants who spent less than 100 days in jail and who were not continuously jailed during the entire pretrial period, after controlling for the seriousness of the crime and the defendant's criminal history, misdemeanants who fail to appear for a pretrial hearing are 2.2 times as likely to spend time in jail as those who have no pretrial FTA.

7. For misdemeanor defendants who are incarcerated, those who fail to appear spend nearly twice as long in custody as other jailed defendants with similar offenses and criminal histories.

8. There were 84 warrants issued for every 100 misdemeanor cases in 1995, mainly for failure to appear.

9. The study indicated that there were several approaches that could be adopted to reduce the incidence of FTAs and FTCs. There are three major approaches which are likely to reduce FTAs and FTCs: 1) reminder strategies; 2) transportation strategies; and 3) information and detention strategies.

10. In response to the findings and recommendations of The Misdemeanant Study, King County and the City of Seattle initiated a number of pilot projects designed to try to reduced [sic] FTA through reminder strategies. In 1999 and 2000, Christopher Murray & Associates was asked to evaluate the effectiveness of these pilot projects.

11. These evaluations concluded that reminder strategies can reduce the incidence of FTA by providing timely and effective notification of scheduled hearings.

12. Reminder strategies can include multiple mailings and timely telephone calls.

13. Based on my analysis of a pilot project conducted by the King County District Court that randomly assigned over 20,000 subjects to either a call group or control group, even computer generated calls such as those used by libraries or school attendance offices can significantly reduce failure to appear.

14. In the pilot project conducted by the King County District Court there were also nearly 7,000 defendants for whom no valid telephone number was available. This group had a statistically significantly higher FTA rate than the control group. From this finding, and from findings of The Misdemeanant Study, we can conclude that if an individual lacks access to traditional communication methods, such as mail or telephone, that individual will

have a higher probability of going to jail and of remaining incarcerated for longer periods of time than individuals otherwise situated.

15. The Misdemeanant Study suggests that increased communication with defendants will also have an effect on the money spent by towns and cities to operate the misdemeanor judicial process. The study predicts that, for every 10 percent reduction in the incidence of failure to appear, jail utilization will decrease by 3.5 percent. Additionally, defendants who fail to appear and fail to comply have, on average, 3.5 times as many hearings as those who appear and comply. Therefore, a reduction in the FTAs will reduce both jail utilization and the number of hearings, both of which would represent a significant savings to the county and its municipalities.

I certify under penalty of perjury under the laws of the 28 USC §1756 that the foregoing statements are true and correct.

/s/ Christopher Murray
Christopher Murray

May 18, 2001
Date and location
Seattle WA

THE MISDEMEANANT STUDY

Misdemeanors and Misdemeanor Defendants in King County, Washington

OVERVIEW & SUMMARY

Christopher Murray
Christopher Murray & Associates
2016 18th Avenue
East Seattle, WA 98112

Nayak Polissar, Ph.D.
The Mountain-Whisper-Light
Statistical Consulting
1827 23rd East
Seattle, WA 98112

Merlyn Bell
M. M. Bell, Inc.
1715 N.E. 80th
Seattle, WA **98115**

THE MISDEMEANANT STUDY

Misdemeanors & Misdemeanor Defendants in King County, Washington – OVERVIEW

In King County, Washington, there were more than 100,000 misdemeanor charges disposed by courts of limited jurisdiction in 1995. It is these charges, the nearly 68,000 defendants and the more than 300,000 misdemeanor jail days associated with them, that are the subject of this report. The numbers tell the story: misdemeanors matter. They matter because everyone is affected by them, because some misdemeanors are serious offenses, because some misdemeanants are serious offenders, and

because local governments spend millions of dollars each year as a result of them. Misdemeanants also matter because there is increasing evidence that paying more attention to misdemeanors can reduce the incidence of serious crime and improve the quality of life in urban areas.

From a policy standpoint, the most important finding of this study is that, independent of current charge or defendant criminal history, failure to appear at court hearings (FTA) and failure to comply with orders of the court (FTC) are important factors that affect decisions to incarcerate and the amount of time defendants remain in custody.

Defendants who fail to appear or fail to comply are more than twice as likely to go to jail as otherwise comparable defendants. Once there, they spend nearly twice as long in custody as other jailed defendants with similar offenses and criminal histories.

The study predicts that for every 10 percent reduction in the incidence of failure to appear, jail utilization will decrease by 3.5 percent. For every 10 percent reduction in the incidence of failure to comply, jail utilization will decrease 1.8 percent. While these reductions in jail utilization may not seem like much, failure to appear is very common and reductions well in excess of 10 percent are clearly possible. With a 1998 booking fee of $125 and maintenance costs of $68.85 per day in the King County Correctional Facility, savings to jurisdictions which contract for jail services can accumulate rapidly. For the county, reduction in demand equivalent to the size of a unit at the Regional Justice Center is likely within the realm of possibility.

Jail costs are only the most easily quantified impact associated with failure to appear and failure to comply. Defendants who fail to appear for a pretrial hearing have, on average, twice as many hearings as those who do appear. Defendants who both fail to appear and fail to comply have, on average, 3.5 times as many hearings as those who appear and comply. All parties to the adjudication process – judges, clerks, prosecutors, defense attorneys, witnesses, and victims – are affected by this. In many cases, when defendants fail to appear, law enforcement must apprehend the defendant twice (or more) before justice is served.

It is in everyone's interest – defendants and the justice system alike – to reduce the frequency of failure to appear and failure to comply.

These findings are especially important because there are things that can be done to reduce the incidence of failure to appear and failure to comply. While evaluation of the effectiveness of specific strategies to reduce FTA and FTC was not part of this study, strategies to reduce FTA and FTC have been tried and proven in other jurisdictions. There are three basic approaches that can be used: 1) reminder strategies can reduce the incidence of failure to appear by providing timely and effective notification of scheduled hearings, 2) transportation strategies can reduce the incidence of failure to appear by helping defendants get to the court who otherwise might not make it, and 3) information and detention strategies can reduce the incidence of failure to appear by providing better information to law enforcement and pretrial release screeners to assist them with arrest and release decisions. Since not all defendants are alike, different strategies are needed for different defendants.

Fortunately, there are things that can be done to decrease failure to appear and failure to comply.

OTHER MAJOR FINDINGS:

- Repeat offenders far outnumber first time offenders in the misdemeanant population. Three quarters of defendants convicted in 1995 had prior misdemeanor charges and two-thirds had prior misdemeanor convictions.

23% of defendants convicted in 1995 had six or more prior misdemeanor convictions.

- An estimated 12.6 percent of defendants had charges disposed in two or more King County courts of limited jurisdiction in 1995. The largest overlap (17.7 percent) occurred between Seattle Municipal Court and other courts.

- Defendant charge history, current offense, and pre-sentence failure to appear or comply are the strongest predictors of misdemeanor jail sentences. When these factors were considered in combination, defendants with four to eight prior misdemeanor charges were nearly twice as likely to go to jail as first time offenders. Those with nine or more prior charges were almost three times as likely to go to jail. Only 10 percent of misdemeanants convicted of the least serious offenses had a jail sentence that involved real jail time, whereas nearly 60 percent of those convicted of the most serious misdemeanor offenses spent time in jail.

- Pre-sentence failure to appear or failure to comply is very common. Post-sentence failure to appear or failure to comply is less common but still frequent.

48% of all sentenced defendants failed to appear at one or more pretrial hearing.

- There were 84 warrants issued for every 100 misdemeanor cases in 1995, mainly for failure to appear. Some offenses, like driving with a suspended license, have very high warrant rates. Offenses that commonly involve pre-sentence booking – like assault in the fourth degree and violation of no contact and similar court orders – have low pre-sentence warrant rates and high post sentence warrant rates. Defendants charged with driving while intoxicated have the highest post sentence warrant rates.

- Misdemeanants were responsible for 38 percent of all jail days in the King County Correctional Facility in 1995. Five percent of sentenced misdemeanants were responsible for 48 percent of these days. This small group had a post sentence failure rate twice that of other sentenced misdemeanants and spent far more time in jail as a result of post sentence FTA/FTC than did others who failed post sentence. While these are probably the most difficult misdemeanant defendants to work with, strategies to reduce post sentence failure may have the biggest impact with this group of defendants.

Five percent of sentenced misdemeanants were responsible for 48% of all misdemeanor jail days.

- There are two types of misdemeanants who spend a lot of time in jail: those who are booked and stay a very long time and those who are frequently booked. These "long stayers" and "rapid cyclers" made up 16 percent of the defendants in jail on misdemeanor charges in 1995 but were responsible for 69 percent of all misdemeanor jail days. Long stayers use far more jail days than rapid cyclers and, because of the nature of their offenses and criminal histories, are unlikely

candidates for pretrial interventions designed to reduce the impact of misdemeanants on the jail. Pretrial interventions may be more appropriate for the 11 to 14 percent of the misdemeanant population who are rapid cyclers.

- When race was analyzed in combination with other factors – such as defendant criminal history, current offense, and defendant compliance behavior – race was found to be a weak predictor of decisions to incarcerate and of length of jail stay. Race was, however, found to one of the better predictors of failure to appear. Since failure to appear affects decisions to incarcerate and jail length of stay, groups with high FTA rates may have the most to gain from strategies to reduce FTA. Just as race and failure to appear are intertwined, it is likely that other explanatory factors not included in this study are confounded with race. Fruitful avenues for additional inquiry include the interactions of race, economic status, ability to pay fines, and patterns of offense that are related to economic status. Because of budget constraints and the difficulty of obtaining some of this information, these issues were not examined in this report.

Differences in criminal history and differences in FTA and FTC rates explain much of the disproportionate use of jail by minority defendants.

- Seattle Municipal Court uses jail more frequently, and fines and other sanctions much less frequently, than other courts of limited jurisdiction in King County. Possible reasons for these differences – such as proximity to the jail, differences in the average economic status of defendants (and therefore mix of crime types and ability to pay fines), and different budgetary practices that encourage or discourage jail utilization – merit further study.

1 SUMMARY

INTRODUCTION

The effects of misdemeanors on society and the criminal justice system are broad and complex. Everyone is affected by them. Whether it's a drunk driver careening in and out of traffic, shoplifters who make prices higher at almost every store, or vandals who trash a neighborhood, misdemeanor offenses are everywhere. Consistent with the "broken windows" theory, greater attention to misdemeanor offenses can also reduce the incidence of serious crime and improve the quality of life in urban areas.

The effects of misdemeanors are also complex. Through their sheer volume, the speed with which they go through the system, the multiple jurisdictions which deal with them, and the convoluted pathways that complicated cases can follow, misdemeanor offenses present a daunting complexity that more often discourages analysis than invites it.

The purpose of this study has been to cut through this complexity and to shed light on some of the major themes that shape the misdemeanor justice system. The vehicle for accomplishing this has been the study of misdemeanor cases disposed by courts of limited jurisdiction in King County, Washington in 1995. King County courts of limited jurisdiction include Seattle Municipal Court, nine divisions of the King County District Court, and a variety of suburban municipal courts. Courts participating in the study represented over 90 percent of the more than 100,000 misdemeanor charges disposed in King County in 1995.

The misdemeanant study took more than a year to complete. The study, in turn, was preceded by more than

two years of effort by a work group of county and city officials who defined the basic questions and who oversaw the execution of the study. The misdemeanant study could not have taken place without the leadership and tenacity of the regular members of this committee.

In addition to the overview and summary, the report has three major chapters plus appendices:

- Chapter 2, "Findings," summarizes findings from the analysis, including a description of defendants, charges, failure to appear and failure to comply, sentences, and misdemeanant jail utilization. Statistical models are presented that examine how various factors working in combination affect issues like failure to appear, sentencing decisions, and jail stays.

- Chapter 3, "Understanding Misdemeanors and Their Consequences," describes the misdemeanor case processing system, the various ways in which misdemeanor cases unfold, and how misdemeanants use jail capacity. A flowchart of the misdemeanor case processing system is also provided.

- Chapter 4, "Methodology," describes how the study was conducted, discusses sources of information used in the analysis, and introduces important concepts in organizing the work.

- Appendices include findings from a survey of district and municipal court judges, recommendations regarding data systems, detailed supporting documentation for issues discussed in chapter 2, and various technical materials. The survey of judges confirmed that judicial opinion about factors that are important to sentencing are consistent with the findings from the analysis of the data. The recommendations about data systems are generally technical but include

important issues regarding data consistency, quality control, and utility.

CONTEXT

Misdemeanors are criminal offenses, defined by law as less serious than felonies but more serious than infractions. In Washington State there are two categories of misdemeanors: regular misdemeanors, which are punishable by fines up to $1,000 and jail sentences up to 90 days, and gross misdemeanors, which can be punished by fines up to $5,000 and jail sentences up to one year.

There are literally hundreds of different misdemeanor offenses, including serious traffic offenses, such as driving under the influence, and serious non-traffic offenses, such as assault in the fourth degree. As this study clearly shows, there are also serious misdemeanor defendants, including many persistent offenders with very long criminal histories.

While most cases are shorter, an uncomplicated misdemeanor case normally has a maximum duration from filing to completion of sanctions of a little over two years. Complications arise when a defendant fails to appear for a hearing or fails to comply with an order of the court. Failure to appear or failure to comply can extend the duration of a case, thereby increasing the workload for the justice system and result in the issuance of warrants and other judicial decisions that increase jail utilization.

Most defendants charged with misdemeanors do not go to jail. Some, of course, are not convicted. For those who are, suspended jail sentences, fines and other non-incarcerative sanctions are used more often than sentences that require real jail time. On the other hand, many

misdemeanants do spend time in jail. In 1995, more than 300,000 jail days were used by misdemeanants in the King County Correctional Facility. Three hundred thousand prisoner days is equal to more than 800 jail beds.

The central questions addressed by this study relate to misdemeanant failure to appear (FTA) and failure to comply (FTC). There are at least three reasons why FTA and FTC are important. First, failure to appear or failure to comply prior to sentencing can increase the likelihood of getting a sentence to jail. Second, failure to appear almost always results in the issuance of a warrant which, if served, will result in jail time. And third, failure to appear or failure to comply after sentencing can result in longer jail stays through revocation of suspended jail sentences.

KEY CONCEPTS

There are two related concepts that were central to the conduct of the study. The first involves the organization of individual charges into categories of charge type and charge seriousness. The hundreds of misdemeanor law titles used in King County were first grouped into 39 categories, each of which was assigned a seriousness level score of between 1 and 6. These 39 categories were, in turn, collapsed into 15 categories for further analysis. All charges therefore have two characteristics assigned to them by the study: charge type and charge seriousness. For example, in this study, "minor in possession" is characterized as an alcohol offense and possession of marijuana is categorized as a drug offense. Both of these categories are assigned a seriousness level score of 2 and are grouped into a single category called "alcohol/drug."

The second key concept involved development of a system to account for the practice of charge and case consolidation. While the number and type of charges is a good indicator of the amount and type of reported crime in a community, dispositions and sentences on individual charges are poor indicators of the consequences of alleged misconduct to either the defendant or the justice system. It is individual cases, or groups of related cases, that are handled by judges, prosecutors, and defense attorneys. It is the defendant, not the charges for which he or she is convicted, that spends time in jail. Consequently, a system was developed to assign all related charges and cases to a single resolution number. The resolution, in turn, was characterized by the most serious charge included in the resolution at the time of filing, the most consequential disposition in the resolution, and the most serious charge at conviction. For example, the most serious charge at the time of filing for a defendant who is charged with driving under the influence (DUI) and driving without a license is DUI. If the case is resolved through a guilty plea to a reckless driving charge and dismissal of the DUI, the most serious charge at conviction would be reckless driving and the most consequential disposition would be the conviction.

The study itself took place in two phases. Phase 1 examined more than 116,000 misdemeanor charges disposed by participating King County courts of limited jurisdiction in 1995. Phase 2 examined a random sample of approximately 2,000 Phase 1 charges that resulted in conviction.

KEY FINDINGS

The study concluded that defendant charge history, the seriousness of the current charge, and pre-sentence failure to appear or failure to comply are the three strongest predictors of misdemeanor jail sentences.

Overall, 32 percent of sentenced misdemeanants in the Phase 2 sample received a jail sentence that involved real jail time (as opposed to sentences where the entire jail term was suspended). When defendant charge history, charge seriousness, and defendant compliance behavior were considered in combination, defendants convicted of the most serious misdemeanor offenses were 5.6 times as likely to receive a jail sentence that involved real jail time as defendants convicted of the least serious misdemeanor offenses. Defendants with four to eight prior misdemeanor charges were 1.8 times as likely to go to jail as first time offenders. Those with nine or more prior charges were 2.9 times as likely to go to jail.

The central hypothesis of this study – that misdemeanant failure to appear and failure to comply are important factors in judicial sentencing decisions and in the amount of time defendants spend in jail – was confirmed. Specifically, it was found that, for the 95 percent of sentenced misdemeanor defendants who spent less than 100 days in jail and who were not continuously jailed during the entire pretrial period:

- After controlling for the seriousness of the crime and the defendant's criminal history, misdemeanants who fail to appear for a pretrial hearing are 2.2 times as likely to spend time in jail as those who have no pretrial FTA.

- For every 10 percent reduction in the incidence of pre-sentence failure to appear or failure to comply, misdemeanant jail days are predicted to decrease by 3.5 percent.

- For every 10 percent reduction in the incidence of post sentence failure to appear or failure to comply, misdemeanant jail days are predicted to decrease by 1.8 percent.

While these percentage reductions are not large, the group of misdemeanants represented by this sample spent an estimated 155,000 days in jail as a result of charges disposed in 1995. A 3.5 percent reduction for this group is more than 5,400 days. At a 1998 jail rate of $125 per booking and $68.85 per day in custody, savings can accumulate rapidly. While larger reductions are undoubtedly more difficult to achieve than smaller reductions, reducing pre-sentence failure by more than 10 percent is well within the realm of possibility. A 30 percent reduction in the incidence of pre-sentence failure would save jurisdictions which contract for jail services more than $1,000,000 per year in the short term and reduce the average daily population in the jail by approximately 45 inmates. If a 40 percent reduction can be achieved (i.e. reducing the incidence of FTA from 48 percent to 29 percent), the savings to the county would be approximately equal to the size of a unit at the Regional Justice Center.

- Pre-sentence failure to appear or failure to comply is very common. Forty-eight percent of all defendants in the Phase 2 sample had a warrant or some other indicator of pre-sentence failure.

- Post sentence failure to appear or failure to comply is less frequent, but still occurred in 21 percent of the Phase 2 sample and for 31 percent of the defendants

who received a sentence that included jail (suspended or otherwise).

Because pre-sentence failure is very common, the opportunities for reducing pre-sentence FTA and FTC are great. The lower base rate for post sentence failure makes reduction in the incidence of post sentence failure more difficult than reduction in the incidence of pre-sentence failure. As a result, strategies to reduce pre-sentence failure hold the most promise for system improvement.

- There were 84 warrants issued for every 100 misdemeanor cases in 1995, mainly for failure to appear.

Some offenses, like driving with a suspended license and theft, have very high warrant rates, exceeding one warrant per case. These offenses are also associated with repeat offenders, suggesting that a general disregard for rules of common behavior may be behind both the offense and the failure to appear. Offenses that commonly involve pre-sentence booking – like assault in the fourth degree and violation of no contact and similar court orders – have low pre-sentence warrant rates and among the highest post sentence warrant rates. It is likely that pre-sentence booking decreases pre-sentence warrant rates for these types of offenses. Defendants charged with driving while intoxicated have the highest post sentence warrant rates. It may be that the number of affirmative conditions placed on DUI sentences (as opposed to non-alcohol related offenses) increases the post sentence failure rate for these types of defendants.

- In addition to its impact on jail utilization, failure to appear and failure to comply increase the workload for the courts, prosecutors, public defenders, and law enforcement.

Defendants who fail to appear pretrial have, on average, twice as many pretrial hearings as those who appear. Defendants who both fail to appear and fail to comply have, on average, 3.5 times as many total hearings as those who appear and comply. All parties to the adjudication process, including law enforcement witnesses, are affected by this. In many cases, when defendants fail to appear, law enforcement must apprehend the defendant twice (or more) before justice is served.

- An estimated 12.6 percent of defendants had charges disposed in two or more King County courts of limited jurisdiction in 1995.

Nearly 18 percent of Phase 2 defendants in Seattle Municipal Court also had cases disposed in other King County courts of limited jurisdiction in 1995. A smaller, but still substantial, percentage of defendants had charges disposed in two or more King County DISCIS-based courts in 1995. The weighted average of these two groups (12.6 percent) is likely an undercount of defendants who had charges in two or more courts at the same time.

- Factors identified in this study as predictors of pre-sentence or post sentence failure are poor predictors of individual behavior but good predictors of group behavior.

When examined in combination, the strongest predictors of pre-sentence failure are defendant charge history, the number of charges in the case or cases in which a defendant is involved, and the race of the defendant. When taken together, the strongest predictors of post sentence failure are defendant charge history, the most serious charge at filing, and the amount of fines imposed at sentencing. Additional study of case and defendant

characteristics (e.g. offense type, defendant socio-economic status, defendant substance abuse history, etc.) may produce better predictive models.

- Misdemeanant defendants were responsible for 38 percent of all jail days in the King County Correctional Facility in 1995. Five percent of sentenced misdemeanants were responsible for 48 percent of these days. The characteristics of this group are: either they spent 100 days or more in jail or they were continuously incarcerated for the entire pretrial period.

While this is undoubtedly the most difficult group of misdemeanant defendants, the most effective strategy for reducing the effect of post sentence failure on jail utilization may be to concentrate on these very heavy users of jail capacity. While small, this group has a post sentence failure rate more than twice that of the rest of the Phase 2 sample. In addition, the consequences of post sentence failure for this group are very large. For the 13 percent that had both pre- and post sentence failure, the average increase in sentence length over those who did not fail was 117 days. For the 30 percent that only had post sentence failure, the average increase in sentence length was 48 days. The increases in the length of jail stay associated with failure by defendants in this group are far greater than those associated with other defendants.

- There are two types of misdemeanants who spend a lot of time in jail: those who are booked and stay for a very long time and those who are frequently booked. Based on an analysis of misdemeanant jail utilization in 1995, these "long stayers" and "rapid cyclers" made up 16.2 percent of the defendants in jail on misdemeanor charges but were responsible for 69 percent of misdemeanor jail days. Long stayers use far more jail days than rapid cyclers.

Two and a half percent of defendants in jail on misdemeanor charges were long stayers who were booked fewer than five times in 1995. This group used 23 percent of all misdemeanor jail days. Another 2.3 percent were long stayers who were also rapid cyclers. This group was responsible for 27 percent of misdemeanor jail days. Defendants who were rapid cyclers but not long stayers made up 11.4 percent of the defendants and used 19 percent of the jail days. Because of the nature of their offenses and criminal histories, long stayers are likely poor candidates for most pretrial interventions designed to reduce the impact of misdemeanants on the jail. However, jail use by this group should go down if their post sentence failure rates are reduced. Jail use by rapid cyclers should go down as a result of policies designed to reduce presentence failure to appear.

- There are many repeat offenders among those convicted of misdemeanors in 1995.

Three quarters of the defendants in the Phase 2 sample had prior misdemeanor charges and two thirds had prior misdemeanor convictions. Many defendants had very long misdemeanor charge and conviction histories. For example, 36 percent of the Phase 2 sample had six or more prior charges and 23 percent had six or more prior convictions.

- When race and other factors were considered in combination, this study found that race was a weak predictor of judicial decisions to incarcerate or of time spent in jail.

When the interactions of a wide variety of factors were considered in combination, the best predictors of judicial decisions to incarcerate and of jail length of stay were

defendant charge history, charge seriousness, and presentence failure to appear or failure to comply. Non-white defendants, especially African American defendants have, as a group, longer charge and conviction histories and are more likely to failure to appear or fail to comply than are white defendants. When these factors were taken into account, the effect of race on sentencing and jail utilization was negligible. Although exploring the reasons for the differences in FTA rates by race is beyond the scope of this study, it is worthy of further inquiry. Since failure to appear affects decisions to incarcerate and jail length of stay, groups with high FTA rates, such as African Americans, perhaps have the most to gain from strategies to reduce FTA.

Charge history and failure to appear or comply do not, however, explain all of the observed differences between races. For example, African Americans and other non-white defendants are less likely to be charged with more serious crimes and more likely to be charged with less serious crimes than are white defendants. While racial differences in charge history and compliance behavior apparently counteract this mitigating factor, the fact that African American and other non-white defendants are more likely to be charged with less serious crime is an issue that merits further study. Just as race and failure to appear are intertwined, it is likely that other explanatory factors not included in this study are confounded with race. Fruitful avenues" for additional inquiry include the interactions of race, economic status, ability to pay fines, and patterns of offense that are related to economic status. For example, it may be that Driving While License Suspended (DWLS), one of the most common less serious misdemeanors, is related to economic status and the

ability to pay traffic tickets. Thus, differences in economic status between races could be reflected in different rates of being charged with DWLS.

- There are important differences in sentencing decisions between courts included in this study. Specifically, Seattle Municipal Court imposes jail sentences more frequently, and fines and other non-incarcerative sanctions much less frequently, than do other courts of limited jurisdiction in King County.

Possible reasons for these differences may include issues such as proximity to the jail, differences in average defendant economic status, and differing budgetary practices that encourage or discourage use of jail by law enforcement. These differences merit further study.

RECOMMENDATIONS

This study demonstrates that defendant compliance with court orders is an important factor that affects jail utilization and workload in other parts of the criminal justice system. Unlike defendant criminal history or current charge, there are things that can be done about this.

Reducing failure to appear and failure to comply is in everyone's best interest. Making sure defendants appear at court and comply with sentence conditions will reduce sentence length and jail time for defendants without any compromise of justice. Courtroom, prosecutor, public defender, probation officer, and law enforcement workloads will go down. Jail utilization, and dollars spent by towns and cities which contract for jail services, will decrease.

While evaluation of the effectiveness of specific strategies to reduce FTA or FTC is beyond the scope of this study, there are three basic approaches that have been used and proven in other jurisdictions:

- **Reminder strategies** reduce the incidence of failure to appear by providing timely and effective notification of scheduled hearings. Things as simple as multiple mailings and timely telephone calls – even computer generated calls such as those used by libraries or school attendance offices in Seattle and King County – may increase appearance rates.

- **Transportation strategies** reduce the incidence of failure to appear by helping defendants get to the court who otherwise might not make it. People without cars, without bus service, or people with limited mobility or ability to use public transportation can be picked up and brought to court. Even taxi rates are cheap when compared to wasted court time and increased jail utilization.

- **Information & detention strategies** reduce the incidence of failure to appear by providing better information to law enforcement and pretrial release screeners to assist them with arrest and release decisions. While perhaps counterintuitive, for defendants with chronic histories of failure to appear, increased pretrial detention may actually reduce total jail utilization for both the defendant and the criminal justice system.

There is no "one size fits all" strategy that is appropriate for all defendants. Different strategies are needed for different types of defendants. For example, one might categorize defendant failure to appear into three types: those who *did not,* those who *can not,* and those who *will not* appear for hearings.

The "did nots" are defendants for whom failure to appear is unusual and out of character. There is probably little or nothing that can or should be done about FTA by these defendants. The "can nots" are repeat offenders who – because of alcoholism or other substance abuse, mental illness, developmental disability, or other cause – have difficulty with many things in their lives. Reminder strategies and transportation strategies are appropriate ways to reduce FTA by many defendants in this group. Some defendants in this group may also be appropriate candidates for detention and rapid case processing strategies. The "will nots" are repeat offenders who, for whatever reason, follow their own rules rather than those of the community at large. For defendants with a proven track record of willful failure to appear, detention strategies and rapid case processing may be the only appropriate response.

PROMISING AVENUES FOR ADDITIONAL RESEARCH

This study answers some questions and raises others. Additional research may help focus policy options and increase understanding of the complex issues associated with misdemeanors and misdemeanor defendants. The following topics are promising avenues for additional research:

- Analysis of additional factors that may improve the ability to distinguish between types of defendants and better predict failure to appear and failure to comply.
- Evaluation of the effectiveness of different FTA and FTC reduction strategies.
- Additional analysis of misdemeanants who have a very high impact on jail utilization and on strategies

that can reduce post sentence non-compliance by this group.

- Evaluation of additional factors that may be associated with race, sentencing, and incarceration (such as economic status, ability to pay fines, and criminal behavior that is related to economic status) that can further help explain differences in criminal justice utilization rates by race.

- Additional analysis of differences between, or salient factors within, jurisdictions that can further refine understanding or improve the accuracy of statistical models for Seattle, King County, and/or suburban cities.

APPENDIX W

Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRCT OF WASHINGTON
AT SEATTLE

CARL A. CURRIER, et al., Plaintiffs, vs. WILLIAM J. HENDERSON, et al., Defendants.	No. C01-0156 SECOND DECLARATION OF CARL CURRIER **CLASS ACTION**

Carl Al Currier declares:

1. I am 47 years old. I am homeless. I have been homeless off and on since 1962.

2. Because I am homeless and stay in emergency shelters, I have to move frequently and am never certain where or for how long I will be in one place. I have no permanent physical address. I generally live in Seattle, Washington.

3. On May 18, 2000 at about 10:15 AM, I went to the Pioneer Square Post Office in Seattle to apply for a Post Office Box and General Delivery mail service. I went to the clerk, told her I was homeless and first asked if I could get a Post Office Box.

4. She asked if I had any address that I could give her as a contact point, such as a mission. Since I am never certain where I'll be from one day to the next, I responded no. I explained to her that the reason that I needed a Post Office Box was because I am homeless and don't have my

own address. The clerk went to check with her supervisor, came back and said I couldn't get a Post Office Box, but could get General Delivery – but only if I went to the downtown Post Office at 3rd Avenue & Union Street. I asked her how long I would be able to receive General Delivery, but she said she didn't know.

5. At no time did the clerk offer me any forms or applications to fill out to get a post office box.

6. She did tell me that General Delivery would be free, so I asked if the Post Office Boxes were free or cost money. She said it cost $22 for 6 months, but that I still needed an address to be able to get a Post Office Box, because the Post Office must be able to mail me a letter and get a response to be able to initiate the process of getting the Post Office Box.

7. She said that if I got a joint Post Office Box with someone else that I could use their address to qualify for the Post Office Box. I told her that I had heard that homeless people could get a Post Office Box as long as they had proper identification, so I showed her my Downtown Emergency Service Center ("DESC") card. She asked me why I didn't use the DESC address to get a Post Office Box, so I explained that I don't stay at DESC and that I have had problems receiving mail there in the past, which is another reason why I was applying for a Post Office Box. She then told me that I still couldn't get a Post Office box – whether or not I had proper identification – because I would not list DESC as my address.

8. On May 22, 2000, I went into the post office at 3rd and Union to inquire about mail delivery. I asked the postal worker if I could get general delivery and the postal worker told me that I could get it for thirty days. I asked

about a free post office box and was told that they cost money. I was also told that I need a verifiable street address to qualify for a box.

9. I never received a written denial of my request for a post office box, or of my appeal rights. I never received a written explanation of why I couldn't get a Post Office Box or who to contact if I still thought I should receive a free post office box.

10. In the summer of 2000, I ultimately signed up for General Delivery service with the Main Post Office.

11. I checked my mail at General Delivery on a weekly basis, never going more than two weeks without checking it.

12. On February 26, 2001, because my driver's license had expired, I attempted to renew it. The clerk at the Department of Motor Vehicles refused to allow me to use general delivery as my address.

13. On February 27, 2001, I attempted to rent a storage bin at the Madison Self Storage. The day manager, Bruce Leon, informed me that he would not accept an address of General Delivery for mail and that he wanted me to provide an "acceptable" mailing address.

14. I have encountered significant problems while attempting to pick up my mail at General Delivery in Seattle. One of these problems involved another General Delivery customer, Charles Currier. For a couple of weeks, he emphatically instructed me to go to the Post Office to pick up my mail, because they tried to give it to him. Mr. Charles Currier told me three times on February 26, 2001 to go to the Post Office to pick up my mail, and said that they were trying to give him letters with the name Carl

Currier on them. However, the clerks at General Delivery responded that I had no mail. Another clerk at General Delivery window said on February 26, 2001 that my mail had been sent back. I had been checking for mail consistently on a weekly basis. When I protested at the General Delivery window, the clerk told me I had to return to Post Office the next week to talk to the morning clerk.

15. In late March, 2001, I temporarily relocated to Everett to be able to better access services. I was staying at a homeless shelter called the Everett Gospel Mission (EGM), but I did not use the EGM for mail or phone messages.

16. On March 22, 2001, I went to the downtown Everett Post Office. I asked the clerk, Jessie, if I could receive General Delivery mail at this Post Office. He said I could receive General Delivery for up to 30 days at this Post Office as long as I hadn't used General Delivery within the last year. Despite the clerk's information, I filled out and mailed a PS Form 3575 (moving & forwarding) along with two PS Forms 3576, regarding my hospitalization and hand surgery. I requested that my mail at Seattle General Delivery be forwarded to Everett General Delivery.

17. On April 2, 2001, I received my first piece of mail at General Delivery in Everett – a letter from the United States Postal Service in Memphis, Tennessee confirming that my mail would be forwarded from General Delivery in Seattle to Gen. Delivery in Everett.

18. On April 12, 2001, I received the first non-Postal Service related piece of mail. The addressee was Charles Currier. I personally returned the mail to the Main Post Office in Seattle.

19. That day, I arrived at 12:15 at Post Office. I was reprimanded by two Post Office Clerks (one a clerk in training with a sign stating so, along with a supervisor, whose name tag read, I believe, 'Sun Tai') that General Delivery is available only to 12:00, and that next time I must arrive before then. The sign posted in their lobby explains that General Delivery is available until 12:30 p.m.

20. On April 26th, 2001, I received three mailed items at the General Delivery in Everett.

21. Nine days later, on May 5, 2001, I received a phone call from Swedish Medical Center that they needed a new address for me. I also received a phone call from a friend explaining that her mail to me had been returned, marked "return to sender."

22. I never received several items of mail which I expected, including: 1) a refund check from Speakeasy in Seattle; 2) a refund check from the King County Courthouse; 3) a credit card from Key Bank (voided); 4) bank statements from Key Bank; 5) a 1099 tax form; and 6) information from Swedish Hospital in Seattle.

23. Because I can no longer consider General Delivery as an adequate form of mail delivery, I have ceased using it.

I certify under penalty of perjury under the laws of the 28 U.S.C. §1756 that the foregoing statements are true and correct.

Dated July 16, 2001

Seattle, King County, WA

/s/ Carl Al Currier
Carl Al Currier

APPENDIX X

The Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARL A. CURRIER, et al., Plaintiffs, v. WILLIAM J. HENDERSON, et al., Defendants.	CASE NO. C01-156L DECLARATION OF BOB SANTOS

Bob Santos declares:

1. From April, 1994 to January, 2001, I served as Housing and Urban Development (HUD) Secretary's Representative for Region X office that covers the four-state Northwest/Alaska Area. My duties included representing the Secretary in generating resources for housing and economic development. I also oversaw the Federal Housing Administration Program, and worked with local and federal governmental agencies to oversee the utilization of federal resources in the region.

2. Among its other activities, HUD provides funding and other resources for non-profit organizations through local government to house homeless in transitional housing and shelters.

3. While I worked in this capacity, the homeless population in Washington State, and especially in the urban areas, was so great that there wasn't enough shelter space to house them all. Additionally, there was a severe lack of transitional housing for the homeless in Washington.

4. My office was located in the Old Federal Building in downtown Seattle, which also houses the Federal Post Office in Seattle. Like other office buildings, it is a facility with heat and showers and bathrooms. Our office felt that, considering there was a lack of shelter and considering that we had an adequate space available, we needed to do our part. Therefore, when I was at HUD, we opened the Old Federal Building as a homeless shelter. It operated every evening, seven days a week. By participating in this endeavor, my staff and I learned a lot about homeless individuals and their situation.

5. One of the shortcomings of the situation was that there was no way for the individuals to receive mail at the Old Federal Building.

6. The homeless people served by HUD and its partners rely on adequate and timely mail service in order to take advantage of HUD's services and the services of its partners, such as the public housing authorities around the State of Washington.

7. HUD believes the best approach for alleviating homelessness is through a coordinated community-based process that provides a comprehensive response to the differing needs of homeless individuals and families, also known as the continuum of care approach. The fundamental components of the continuum of care system, which include outreach, intake and assessment, emergency shelter, and transitional and permanent housing are difficult, and often impossible, to implement when eligible homeless individuals are unable to receive mail.

8. HUD funds programs that provide housing, including emergency shelter, transitional and permanent housing. In order to more quickly and effectively facilitate an

application for housing with any HUD-funded program, access to mail services is vital. An inability to use the mail can result in a delay or denial of housing services from a HUD-funded program.

9. HUD funds programs that provide training, including employment-related training, as part of the continuum of care. In order to more quickly and effectively facilitate an application for a training program with a HUD-funded program, access to mail services is vital. An inability to receive mail can result in a delay or denial of an application for training services from a HUD-funded program. An inability to access mail can result in further employment related consequences for homeless individuals.

10. HUD funds programs that provide access to health care to the homeless. In order for individuals to effectively take advantage of these services, access to mail services is essential. An inability to use the mail can result in a delay or denial of access to necessary health care.

11. As the Secretary's Representative for the Northwest Region, I worked with local government and businesses to spread the services for homeless individuals inside and outside and throughout of the traditional downtown urban areas. This is an important goal for local government, business, etc. In my opinion, it is important for the Postal Service to assist with this goal, in order to allow homeless individuals to receive mail in the neighborhood where they live, work and receive medical and other necessary services.

12. Because Post Offices are strategically located in most places where individuals, both housed and homeless, reside, they represent an important resource for all individuals, and should be accessible by all citizens.

13. On March 1, 2000, I sent a letter to Dale R. Zinser, the Seattle District Manager, in which I outlined my concerns about lack of mail services to the homeless. I copied that letter to the Postmaster General and to the Consumer Advocate at the Postal Service. A copy of the letter is attached as Ex. A.

14. On March 14, 2000, Mr. Zinser responded by letter indicating that postal service guidelines had been adopted to ensure that homeless individuals received their mail. Mr. Zinser indicated that instructions regarding these guidelines had been reissued to all Post Offices in the Seattle District. A copy of the letter is attached as Ex. B.

15. However, in the March 14 letter, Mr. Zinser also indicated that the homeless were not eligible for no-fee Post Office boxes.

16. I strongly believe that universal and free access to the mail is necessary to assist the homeless in receiving services and in their transition to more stable housing situations. Because the homeless lack other traditional means of contact, mail service is particularly important in providing services to them.

I certify under penalty of perjury under the laws of the 28 USC §1756 that the foregoing statements are true and correct.

/s/ Bob Santos	7/21/01 Seattle WA
Bob Santos	Date and location

DISTRICT MANAGER
SEATTLE DISTRICT

[LOGO] *UNITED STATES*
POSTAL SERVICE

March 14, 2000

Bob Santos
Secretary's Representative
US Department of Housing and Urban Development
909 1st Ave Suite 255
Seattle WA 98104-1000

Dear Mr. Santos:

Thank you for contacting me regarding mail delivery for homeless people. Hopefully I can clarify the policy of the Postal Service and satisfy your concerns.

The Postal Service will provide delivery service to all customers, regardless of their economic or social status. We recognize the plight of many homeless individuals and have adopted guidelines to ensure he/she receives their mail. Our policy allows homeless individuals to receive unlimited general delivery of mail or the ability to rent a post office box, provided they meet three general criteria, i.e., known to the Postmaster or clerk, valid identification, or a verifiable point of contact.

Your correspondence did not indicate where or what Post Offices were not following these guidelines. Nonetheless, I have reissued instructions to all Post Offices in the Seattle District on the procedures for handling mail or Post Office box applications from homeless individuals.

I must point out the attachments you received from Columbia Legal Services contained a misinterpretation by their legal staff on the policy for no-fee Post Office boxes.

Postal Service policy regarding no-fee Post Office boxes does not apply to homeless individuals. The criteria for eligibility for no-fee boxes is clearly restricted to those customers who possess a "physical residence or business location" within the delivery area of the Post Office and have no other means of delivery. By definition, homeless individuals do not have a physical residence and are, therefore, not eligible for a no-fee Post Office box.

Should you have any additional questions regarding this policy or still desire to meet to discuss this issue, please contact me at (206) 442-6299.

Sincerely,

/s/ Dale R. Zinser
Dale R. Zinser
District Manager

P.O. Box 90400
SEATTLE WA 98109-9997
206/442-6299
Fax:206/442-6066

U.S. Department of Housing and Urban Development
The Secretary's Representative

[LOGO]
Northwest/Alaska

March 1, 2000

Dale R. Zinser, District Manager
Seattle District
U.S. Postal Service
P.O. Box 90400
Seattle, WA 98109-9997

Dear Mr. Zinser:

A member of my staff received the enclosed material from Columbia Legal Services. The material indicates that local post offices may be placing unnecessary restrictions on the ability of homeless people to receive mail.

As Secretary's Representative for the four state Northwest/Alaska Area, I am very concerned that people served by this Department will not have full access to services because they do not receive mail. Opportunities for housing, job training, medical assistance and other much needed services may be lost simply because mail is not received.

I ask that you review the enclosed material and that you call me at your earliest possible convenience to discuss the material. I suggest that we include Columbia Legal Services in this discussion in order to obtain the full benefit of their experience with the issues.

At the suggestion of your Consumer Affairs Office, I am sending copies of this letter to the Postmaster General and to the Consumer Advocate. I hope you can guide our

discussion in how we can best address these issues at the national level.

Thank you for your attention to this matter. I look forward to meeting with you soon. You may call me at (206) 220-5101 or David Hashimoto at (206) 220-5104 extension 3521 to arrange a meeting.

Sincerely,

/s/ Bob Santos
Bob Santos
Secretary's Representative

cc.

Postmaster General
Consumer Advocate
Andy Ko

Suite 255 • Seattle Federal Office Building • 909 First Avenue • Seattle, WA 98104-1000
www.hud.gov/washington.html

Pacific Northwest Regional Office
Columbia Legal Services [LOGO] 2828 Colby, Suite 405
Everett, WA 98201
(425) 259-3421
(800) 822-0225
(425) 259-3560 (fax)

Ada Shen-Jaffe, Director

February 28, 2000

David Hashimoto, Community Builder
U.S. Department of Housing and Urban Development
Seattle Federal Office Building
909-1st Avenue, Suite 200
Seattle, WA 98104-1000

Dear David,

I think that the enclosed memorandum outlines the problem that is created by the US Postal Service's widespread practice of limiting or outright denying homeless customers a means to receive their mail. We think that initial steps to resolving the problem would be for the Postal Service to:

1) Issue an *immediate directive* to all post offices clarifying that a) there is no 30-day limitation on general delivery service, b) homeless customers are entitled to post office box service, and c) postal customers unable to receive carrier delivery, including homeless customers, are entitled to Group E no-fee post office boxes.

2) *Revise existing regulations,* including but not limited to the *Domestic Mail Manual,* to clarify the above and to permanently correct regulatory language that has caused the Postal Service's widespread practice of denying mail delivery to homeless customers.

3) Conduct *comprehensive retraining* of Postal Service employees concerning a) their duty to assist homeless customers to receive their mail, b) the extreme importance of such service to homeless customers, and c) proper practices in making eligibility determinations – including the issuance of a written notice of denial and the customer's right to appeal where there is a *bona fide* basis for denial of service.

While we understand that the regional office of the Postal Service may only have direct authority to affect these changes within its own jurisdiction, we have reason to believe that the denial of mail delivery service to homeless people is a problem across the nation. The Postal Service should therefore approach this as an agency-wide problem. If HUD and the Postal Service feel that it would be helpful to meet with us to discuss steps to remedy this problem, we are available. We very much appreciate your assistance.

Yours,

/s/ Andy Ko
Andy Ko
Casey Trupin
David Girard
Staff Attorneys

Pacific Northwest Regional Office
Columbia Legal Services [LOGO] 2828 Colby, Suite 405
Everett, WA 98201
(425) 259-3421
(800) 822-0225
(425) 259-3560 (fax)

Ada Shen-Jaffe, Director

Denial of Mail Service to Homeless Postal Customers
Memorandum to David Hashimoto,
U.S. Department of Housing and Urban Development

February 28, 2000

Issue: The United States Postal Service routinely denies mail delivery to homeless customers. This is clearly a statewide problem in Washington and appears to be an issue across the nation.

Description of the Problem: Postal Service employees are incorrectly interpreting federal postal regulations to limit **general delivery services** to no more than 30 days. After that period, customers are improperly being required to make other arrangements to receive their mail. For most homeless people, the only secure and private means of receiving their mail is to obtain a **post office box** ("POB"). However, Postal Service employees are requiring homeless customers to provide a verifiable "physical address (i.e., an individual's residence or business's locations)" and telephone number in order to obtain a POB. This practice appears to be based on postal workers' interpretation of Domestic Mail Manual D910.2.3 and/or simply because the existing printed application for a POB (Postal Service Form 1093) cannot be completed without this information. Of course, by definition, homeless customers have no residential address – which is why they

need a POB in the first place. Even when homeless clients are able to convince postal workers that they may be entitled to a POB without a permanent residential address, Postal Service employees routinely deny eligibility for **Group E "no-fee" POBs**. In the majority of cases, denial of mail services is made verbally, without any form of written notice, which in effect bars homeless customers from appealing the postal worker's eligibility decision.

Harm to Homeless Mail Customers: The harm caused by the deprivation of postal service is fairly obvious to anyone who has gone without access to their mail. In the case of homeless postal customers, the harm is greatly magnified. Most homeless families and individuals depend on the Postal Service for delivery of **legal notices** affecting their eligibility for **housing, public benefits and medical care**. In many cases, homeless individuals without mailing addresses unintentionally "fail to appear" to defend themselves against criminal charges because they are unable to receive notice of court proceedings. There are indications that such failures to appear in criminal cases often result in increased likelihood of incarceration and substantially longer periods of imprisonment. Homeless people also depend on mail service in order to maintain contact with **employers, doctors, attorneys, social service providers and others who provide critical assistance**. Access to postal services also affects a homeless person's ability to vote and maintain family contacts.

Legal Requirements: There are broad constitutional arguments (privileges and immunities, equal protection, due process, etc.) that homeless people may not be denied mail service. Federal statutes, regulations and agency directives that specifically address mail delivery services also have been violated by the Postal Service's widespread

practice of denying homeless customers ongoing general delivery and mandatory no-fee POBs. For example, Postal Bulletin 21877, dated September 29, 1994 (attached to mailed copy), explicitly requires provision of ongoing general delivery or POB mail service to homeless customers. Published amendments to the Postal Service's regulations also require provision of a no-fee POB to any customer who is eligible for but unable to receive carrier delivery. Special Services Reform Implementation Standards, 62 Fed. Reg. 31515 (1997) (attached to mailed copy). Moreover, a former Postmaster General explained this Postal Service policy by stating that "[a]ll Americans are entitled to a free form of mail service." Postal News, release No. 32, April 6, 1998 ("No-Fee Post Office Box Eligibility") (attached to mailed copy).

For more information, please contact:

Andy Ko at (425) 259-3421, ext. 238,
David Girard at (206) 464-5936, ext. 204 or
Casey Trupin at (206) 464-5936, ext. 239

APPENDIX Y

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARL A. CURRIER, et al., Plaintiffs, v. WILLIAM J. HENDERSON, et al., Defendants.	CASE NO. C01-156L DECLARATION OF KATHY ROSETH

Kathy Roseth declares:

1. I am the director of Porchlight, a new housing center operated by the Seattle Housing Authority. Porchlight is located at 907 NW Ballard Way in Ballard, Seattle, Washington.

2. The Seattle Housing Authority is a municipal corporation that provides affordable housing to people who earn less than the median income for Seattle. SHA is one of the largest housing authorities in the nation to earn the HUD ranking of "high performer." SHA owns and operates 6,700 public housing units that are subsidized by HUD, and nearly 1,200 additional units for seniors and people with disabilities as part of the Seattle Senior Housing Program. SHA is the city's largest provider of low-income and affordable housing.

3. The Low Income Public Housing Program (LIPH) provides low-rent housing to families whose income is less than 80 percent of median. SHA has 35 LIPH communities and over 700 Scattered Sites, totaling nearly 6,500 units.

The Section 8 Program is a public/private partnership designed to provide rent subsidies for low-income families, using the existing privately-owned rental housing stock in the community. The program is subsidized and regulated by HUD. PorchLight manages the Section 8 Program and the admissions process for Low Income Public Housing and the Seattle Senior Housing Program (SSHP).

4. Porchlight is a center where people seeking housing can conveniently learn about a variety of housing opportunities. Porchlight provides information about and applications for Public Housing, Section 8, and SSHP.

5. Porchlight also provides housing counseling and referral services. Porchlight's housing counselors guide individuals through various housing options, including information on affordable housing opportunities with nonprofit housing providers, and in the private rental market. The center handles Seattle Housing Authority waiting-list applications, interviews for placement in housing authority-operated housing, and orientation meetings for new tenants.

6. Although the Seattle Housing Authority provides other services, the housing services described above are only available at Porchlight.

7. As of May, 2001, there were 22,670 SHA Housing Residents. Of those, 11,169 were in Low-Income Public Housing, 10,255 were in Section 8 housing and 1,246 were in Seattle Senior Housing. There are 11,963 applications on the waiting lists for these programs, with some duplication. There were 2,987 applications on the waiting list for Low-Income Public Housing, 8,163 applications on the waiting list for Section 8 and 813 applications on the waiting list for Seattle Senior Housing.

8. In my experience, homeless individuals are often in dire need of housing. SHA prioritizes the applications of homeless and displaced individuals highly. Many homeless individuals do make significant attempts to locate affordable housing.

9. Often, we need to follow up with applicants before their applications are approved in order to gather more information. Again, we make every effort to do this with homeless clients, but we have found that their lack of access to a stable mailing address and to other means of communication such as telephones, faxes or email, can result in complications in our ability to communicate with them. This can and does affect their chances of getting their applications approved.

10. When an application is approved, SHA does everything it can to communicate to the individuals regarding that approval. However, because we have a long waiting list, if we are unable to communicate with them within a certain amount of time, their applications can no longer be considered.

11. To be able to take advantage of SHA's resources, an applicant generally needs to have a adequate way to receive mail in a timely manner.

12. The waiting period for housing is [sic] can vary from months to years depending on the program to which the applicant applies. Because of their emergent needs, homeless applicants generally have priority on the waiting lists for one-bedroom Low Income Public Housing Units. Nonetheless, their applications are sometimes denied solely because, despite our best efforts, we can't find or contact them.

13. In the past year, SHA has had to cancel the applications of 3,294 homeless or displaced individuals due to returned, undeliverable mail.

14. In my experience, due to their lack of access to mail services and other means of communication, it has been more difficult for SHA to follow-up with homeless clients than with housed clients. As a result, such clients have lost affordable, subsidized housing opportunities.

I certify under penalty of perjury under the laws of the 28 USC §1756 that the foregoing statements are true and correct.

/s/ Kathy Roseth	August 2, 2001 Seattle
Kathy Roseth	Date and Location

APPENDIX Z

BEFORE THE UNITED STATES POSTAL SERVICE

In the Matter of the Petition by CARL A. CURRIER, Refusal to Provide Post Office Box or General Delivery Service	P.S. Docket No. POB 00-209 DECLARATION OF DANIEL MALONE

Daniel Malone declares:

1) I am the Housing Program Manager of the Downtown Emergency Service Center (hereafter "DESC").

2) I am responsible for oversight and supervision of DESC's residential programs, including DESC's emergency shelter program located at 517 Third Avenue, Seattle WA 98104.

3) I have worked at DESC for 11 years.

4) DESC provides emergency shelter, supportive transitional and permanent housing, and licensed mental health and chemical dependency services to homeless adults in King County. DESC's emergency shelter operates 24 hours per day and serves over 8,000 different people annually without charge. In addition to overnight accommodations and evening meals, the shelter operates as a drop-in center during the day where clients have access to hygiene facilities, medical care, information and referral services, medical respite, mental health and chemical dependency treatment, and phone message services.

5) At its own expense, DESC also provides limited mail services to clients, many of whom do not reside in our overnight shelter. On Mondays through Fridays, DESC support staff retrieve mail from a United States Postal

Service (hereafter "USPS") office in the Smith Tower at 506 Second Avenue. The staff then sorts the mail by recipient's name. No new mail service is provided on the weekends. Clients can retrieve mail from staff in the shelter according to the following schedule: 8:00 a.m. to 10:00 a.m. (the current day's mail is not available at this time), 2:00 p.m. to 4:45 p.m. (new mail from that day and any old mail remaining), and throughout much of the evening (but only for clients who are staying overnight in the shelter). DESC processes over 60,000 pieces of mail each year. Due to this large volume of mail and DESC's limited resources, DESC accepts and processes only First Class mail for clients. Any mail unclaimed after seven days is returned to sender.

6) DESC is unable to process, and therefore clients cannot receive, any other form or class of mail at the center, including magazines, newspapers and other periodicals. Due to the sheer volume of mail and immense needs of our clients, we are forced to not accept from the Post Office all non-first class mail that is addressed to our clients. I am unsure of what happens to mail that is not First Class that is addressed to clients at DESC.

7) This mail service is available to any homeless adult who registers for services in the DESC shelter. In a few circumstances, however, some clients become barred from using DESC's shelter services and are notified that DESC will stop processing mail for them beginning two weeks after shelter services are withdrawn. Clients have been barred from DESC shelter services for many different reasons, but rarely, if ever, for mail fraud.

8) DESC provides these services because the receipt of mail is extremely important to homeless individuals

because they lack other forms of communication. Additionally, homeless individuals are generally unable to avail themselves of adequate mail services through the USPS. Among the reasons for this are:

(a) Limits on both the time and location of general delivery services;

(b) Cost of post office boxes; and

(c) Barriers, other than cost, to obtaining a post office box.

9) Demand for overnight spaces in shelters far exceeds the supply in King County. As such, many of the homeless people served by DESC do not stay overnight in the shelter, but instead sleep on the streets, in parks, in cars, or in other temporary housing situations throughout the city and county.

10) Because the population we serve, and the Seattle homeless population in general, is not solely located downtown, many homeless persons who use general delivery mail would and do have to use public transportation to pick up their mail. The daily cost for this incurred by a homeless person who is not staying in the downtown core of Seattle is between $1.00 or $1.25 depending on the time of day and assuming that clients get a transfer and return home within a few hours of picking up their mail. If the individual does not use a bus transfer the cost of traveling downtown to pick up general delivery mail could be between $2.00 to $2.50 per day.

11) Mail services are a burden on our center which we have assumed because the USPS has not provided homeless people with necessary postal services, specifically no-fee post office boxes. Shouldering this burden

causes us to limit some of the other services that we are able to provide to our clients.

12) Mail is of utmost importance to homeless individuals. It impacts their ability to stabilize their lives by affecting their communication with family members, the legal system, health care providers, financial institutions, government assistance systems, potential housing providers, and other support systems or individuals.

13) DESC clients are issued identification cards. These identification cards list the name, address, and phone number of the center. The cards also list the name and birth date of the client, the date the card was issued, and a client ID number in the form of a bar code. The cards are issued to shelter clients upon initial registration so we can efficiently keep track of when clients use the shelter and what services they receive. Clients must swipe the card in a reader each time they enter the shelter. The client ID number on the card is a unique identifier used by our software program to manage the data.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 15th day of August 2000.

/s/ Daniel Malone
Daniel Malone

APPENDIX AA

→ We can hold your mail for a minimum of **3**, but not for more than **30 days**.

Authorization to Hold Mail

NOTE: *Complete and give to your letter carrier or mail to the post office that delivers your mail.*

Postmaster: Please hold mail for:

Name(s) Address *(Number, street, apt./suite no., city, state, ZIP + 4)*	☐ **A.** Please deliver all accumulated mail and resume normal delivery on the ending date shown below. ☐ **B.** I will pick up all accumulated mail when I return and understand that mail delivery will not resume until I do.

Beginning Date	Ending Date *(May only be changed by the customer in writing)*	Customer Signature

For Post Office Use Only

Date Received

Clerk	Bin Number
Carrier	Route Number

(Complete this section only if customer selected option B)

☐ Accumulated mail has been picked up.	Resume Delivery of Mail *(Date)*	By

PS Form **8076**, April 2001

APPENDIX BB

[LOGO] *UNITED STATES POSTAL SERVICE* *usps.com*

HOUSEHOLD BUSINESS

No-Fee Post Office Box Eligibility

April 6, 1998

The Postal Service announced today that it will extend no-fee post office box eligibility to "quarter-mile" customers. The change, effective April 5, 1998, marks the first step to modify a rule that originated after Rural Free Delivery (RFD) was initiated in 1896.

Postmaster General Marvin Runyon, who made the announcement, said the move will update postal regulations to become more in line with today's customer needs. "All Americans are entitled to a free form of mail service," Runyon said.

This change will provide post office box service at no charge to hundreds of thousands of customers who reside or conduct business within a quarter-mile of rural post offices, and who are ineligible for any form of carrier delivery service.

The free P.O. box offer will not apply to customers who currently pay for delivery through post office boxes as an alternative to, or in addition to, carrier delivery, or those who have erected out-of-bounds mail boxes. Business and residential customers who choose to use post office box service as an alternative to street delivery will continue to pay for post office box service.

BEST AVAILABLE COPY

Quarter-Mile Rule
General Questions and Answers

Q. What is the "quarter mile" rule?

A. The quarter-mile rule is believed to have been created more than 90 years ago as an offshoot of Rural Free Delivery (RFD). Residents and businesses located within a quarter-mile of rural post offices – who did not receive delivery on an existing carrier route – were required to visit the post office to obtain their mail.

Q. Why was it created?

A. Historical records are not clear, but it appears that carrier delivery was targeted to customers for whom the trip into town was considered a hardship given the modes of transportation available and road conditions. Customers near the post office already had reasonable and convenient access to mail services by community standards, so carrier delivery was not warranted.

Q. Why are you changing it, and why did you wait so long?

A. We actually laid the groundwork for this change nine and one half months ago. During proceedings of the Special Services Reform case (MC96-3), we recognized the need to correct the inequitable treatment of quarter-mile customers in that they were the only customers ineligible for carrier delivery who were also ineligible for no-fee boxes.

Q. How many boxes are impacted and how much will this cost the USPS?

A. If all quarter-mile customers accept a no-fee (Group E) box from the Postal Service, an estimated 720,000 boxes

would be affected, for an estimated cost of up to $8.7 million under the current fee schedule and $13.1 million under the schedule proposed in the current rate case proceeding.

Q. What size post office box may customers obtain?

A. At rural delivery offices, customers may obtain the smallest post office box that is available at no fee. However, this limitation may be removed in the pending Omnibus rate case.

Q. What are "out-of-bounds" customers, and how will this rule impact them?

A. Out-of-bounds customers, who are typically rural residents, do not receive carrier delivery to their property. These customers place their mail boxes on the carrier's line of travel near other mail boxes. Out-of-bounds customers who reside or conduct business more than a quarter mile from the post office will not be impacted by this change

Q. Are customers entitled to a refund if they have already paid their box fee for a period beyond April 5?

A. No. Instead, customers would complete their current service term and upon renewal, would receive box service at no cost. For future guidance concerning refunds of box fees, please refer to DMM D910.6.0.

Q. Which areas are affected?

A. Post offices that offer rural delivery. Post offices with city carriers and post offices with post office box service only, (non-delivery offices) are not affected. District

Operations Support personnel are aware of the offices affected by this new change.

Quarter-Mile Rule
Customer Questions and Answers

Q. Why are quarter-mile customers now eligible for no-fee boxes?

A. The extension of eligibility for no-fee boxes to the quarter-mile customers is a continuation of our efforts to restructure and update some of our special services. We took our first step last summer, with the implementation of Special Services Reform, when we provided Group E (no-fee) boxes for the first time to customers ineligible for carrier delivery outside of the quarter-mile. Now, we are extending eligibility [sic] those customers who do not receive carrier delivery due to the quarter-mile rule.

Q. When does this new policy take effect?

A. April 5, 1998. As announced in the Federal Register on Friday, March 27, 1998.

Q. Which new customers will be eligible for a no-fee box?

A. Prior to this action, quarter-mile customers were the exception to the rule. Now they will be now subject to [sic] same eligibility standards as other customers. To be eligible for a no-fee box, all customers must meet the following criteria:

- They reside or have a business within the geographical boundaries of the post office's delivery area ZIP Codes.

- The Postal Service has determined that they are not eligible for any form of carrier delivery service.
- They do not currently receive delivery through an out-of-bounds receptacle.

Q. Please clarify eligibility for carrier delivery.

A. The following clarifies the term "eligible for carrier delivery" and explains limits on providing Group E boxes. Customers residing where the Postal Service is unable to extend delivery (e.g., historic areas, locations with restrictions imposed by community law or regulation, etc.) are not eligible for a no-fee box. For all other customers, the bottom line is: if we deliver to them on the street, or make a bona fide effort to deliver on the street (e.g., they could erect a box and get delivery if they wanted to, but they choose not to do so), then they are not eligible for a no-fee box. If we do not provide carrier delivery to customers who otherwise meet extension criteria, then they are eligible for a no-fee box until such time as carrier delivery is extended to them (if ever).

Q. What size box do we have to provide?

A. In non-delivery offices, any size box is available to qualified Group E box customers. In all other offices, only the smallest available box may be provided at Group E fees. In some cases, the smallest available he [sic] box could be larger than size 1. Smallest box available should not be confused with smallest *installed* box. If a customer is placed in a box larger than the smallest installed, they will not be moved to the smaller box when it becomes available, and they maintain their no-fee status in the larger box as long as they continue to meet all of the eligibility criteria cited above.

Note: The Postal Service has proposed providing any size box available to Group E customers in the R97-1 Omnibus rate case.

Q. Do we have to provide the same size box they were previously paying for?

A. Only the smallest available box should be provided in delivery offices, while any size box may be provided to Group E customers in non-delivery offices. Accordingly, the answer depends on the kind of office and size of box with which a customer begins.

Q. Are they entitled to a refund if they have already paid their box fee for a period beyond April 5?

A. No. Instead customers would complete their current service term and, upon renewal would receive box service at no cost. For further guidance concerning refunds of box fees, please refer to DMM D910.6.0.

Q. What happens if we have no vacant boxes to provide eligible customers who do not currently have post office box service?

A. If no vacant boxes are available at the time of application, the office should provide general delivery service until a box becomes available.

Q. Is there a limit on the number of no-fee boxes we will provide per household/business?

A. Each eligible household/business, defined as a single potential delivery point, is entitled to one no-fee box. No-fee boxes are based upon the eligibility of the residence or business location for carrier delivery, not the individual's. For example, three roommates sharing a home are not

eligible for individual no-fee boxes – only one box would be provided.

Q. What if a customer currently uses a business box and a personal box at the same office? Would they be entitled to two no-fee boxes?

A. If the business location and the residence location meet separate eligibility requirements, then a customer could be, theoretically, entitled to two no-fee boxes. However, if the residence and the business occupy the same potential delivery point, then the customer can have only one no-fee box.

Q. If a residence is eligible for a no-fee box, but the customer does not have proper documentation, should he/she have to pay for the box at the time of application? If he/she pays and then brings back proper documentation, is he/she eligible for a refund?

A. In accordance with DMM D910.2.4, we should only issue boxes when customers have presented proper documentation. The burden of producing proper information establishing eligibility for no-fee boxes is on the customer. This is a revenue protection measure. If, on the other hand, the postmaster is uncertain of the delivery eligibility status for the address of a customer who has provided proper documentation, the recommendation is to issue the box temporarily at no fee until eligibility can be verified. This approach would be taken when a determination can be made within a very short time frame. The other alternative is to issue the box at the appropriate fee, and then if it is determined that the customer is eligible for a no-fee box, the customer's payment would be refunded according to the refund policy in DMM D910.6.0. However, they

would lose the first three months' payment and be refunded the remainder.

Q. Who do I call if I have questions about the new policy?

A. Contact the Core Business Marketing group's Special Services staff at 202-268-3295.

APPENDIX CC

United States General Accounting Office

GAO — Report to Congressional Requesters

July 2000

HOMELESSNESS

Barriers to Using Mainstream Programs

[SEAL]

[LOGO]

* * *

Providing the required documentation is essential to obtaining federal assistance but can be particularly problematic for homeless applicants. Many mainstream programs require applicants to provide documents proving their identity, citizenship, income, and financial resources, among other things. However, homeless people often do not have these documents because they do not have a safe and secure place to store important papers. For example, in 1998, the National Law Center on Homelessness and Poverty found that working homeless people are not always able to receive the Earned Income Tax Credit because they are unable to obtain and keep the tax forms needed to document their earned income. Similarly, because homeless people often

receive medical care at various locations, including emergency rooms and clinics at scattered sites, they may have difficulty providing the location of their complete medical records to document their disability, as required for SSI and other programs.

Communication and Transportation Obstacles

Communication difficulties can hinder homeless people in applying for assistance from mainstream programs. The application process for many programs can involve multiple contacts – in person, on the telephone, or by mail – between the applicant and one or more program offices. Failure to respond to a request for information from a program or to meet certain deadlines can delay an applicant's receipt of benefits. Like many other low-income people, homeless people may lack a telephone, but they are also more likely to lack a reliable mailing address. As a result, communicating with program offices can be difficult. For example, applicants for public housing are typically put on a waiting list until housing becomes available, which can be several months or years. When a homeless applicant reaches the top of the list, the

housing authority maintaining the list may be unable to contact the applicant to offer housing. As a result, the homeless applicant may either be deleted from the list or moved to the bottom of it.

Communication problems can continue once a homeless person enrolls in a federal program. For example, without a dependable mailing address, a homeless family may have difficulty receiving, on a reliable and consistent basis, the cash benefits available through the Temporary Assistance for Needy Families program. Communication difficulties can also create obstacles to receiving consistent medical care, including care provided through federally supported programs such as Medicare, Medicaid, and the Community Health Center program.[4] A homeless person without a telephone or mailing address may have difficulty making and keeping scheduled appointments and arranging for appropriate follow-up care.

[4] The Community Health Center program is a federal grant program that helps fund health centers serving medically underserved populations.

For many low-income people, the contacts necessary with program offices and service providers are also made difficult by a lack of transportation. This problem is common among homeless people, who are less likely to own a car and whose minimal resources may make public transportation unaffordable. Without adequate transportation, it is more difficult to apply for benefits or attend
the interviews required as part of the application processes. Transportation difficulties can also hinder the ability of homeless people to use the services they need, such as medical care, job training programs, and outpatient programs for substance abuse treatment.

Obstacles Posed by the Lack of Stable Housing

Without stable housing, homeless people face certain practical constraints on their ability to effectively use many federal mainstream programs. For example, homeless people generally have no place to store or refrigerate food purchased with food stamps, and the program does not allow them to use food stamps to purchase hot prepared foods from grocery

stores. As a result, they may be less able to maintain a nutritious, healthy diet. Recognizing this problem, the Congress amended the Food Stamp Act in 1990 to allow homeless people to redeem their food stamps at certain authorized restaurants for hot meals; however, few restaurants are enrolled in this program.

* * *

APPENDIX DD

WALL STREET JOURNAL 07/20/01 p. A1

Wytch's Brouhaha: Demoness Ipek Clashes With Mark Warlokk

* * *

Issue Is Who Gets Their Mail; And It's Decided, as Ever, By an Obscure Postal Court

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By Jess Bravin
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON – For the rock group Wykked Wytch, creative tempers finally exploded at Milwaukee Metalfest XIII two years ago. Led by guitarist Mark Warlokk, three members of the quartet abandoned singer Demoness Ipek at their hotel, returned home to the Philadelphia suburbs and announced they would rock on without her. Ipek countered that she was the Wykked Wytch and would still perform as such, conjuring a legal clash over the band's name, equipment and unsold T-shirts that continues to bedevil the Pennsylvania courts. So, meanwhile, who gets Wykked Wytch's mail?

[Picture Omitted In Printing]

That question involved more than an occasional postcard; the mail was the band's commercial lifeblood. The postman brought promoters' queries, radio play-lists and, on good days, $12 checks from fans ordering the group's album, "Something Wykked This Way Comes."

So the musicians turned to a little-known tribunal with authority over the nation's mail system: the Judicial Officer Department of the U.S. Postal Service. In cases

like these, "we have mail piling up," says James A. Cohen, a former Atomic Energy Commission lawyer who has headed the postal justice system since 1978. "We have to make a fairly quick determination."

As judicial officer, Mr. Cohen presides over a six-member administrative-law bench that decides dozens of cases each year. The postal judges travel the country to hear disputes, and they resolve others through mail and telephone proceedings. They also have their own 20-seat courtroom, located across the Potomac in a suburban Virginia office complex shared with the American Butter Institute and the National Stone, Sand and Gravel Association.

[Picture Omitted In Printing]

Many cases involve conflicts between the Postal Service and its private contractors, while others concern window clerks accused of shorting the cash drawer. But part of the docket is peculiar to the postal bench – flights over what can be mailed, where the mail goes and how much it should cost.

"I had no idea this system existed," says David Girard, a lawyer with Columbia Legal Services in Seattle who argued a postal case last year. "It was like stumbling upon a secret society."

Mr. Girard represents three homeless men who, among other claims, say the postmaster is violating their rights by refusing to give them free post-office boxes. The argument: Regulations authorize free boxes for customers "ineligible for any form of carrier delivery service." Since the post office won't deliver to people sleeping on the

street, Mr. Girard says, "by definition, the homeless are ineligible for carrier-delivery service."

In legal papers, the Postal Service replies that it never intended to cover the homeless, but rather those with "a physical address at a location where carrier delivery could be offered, but USPS has made a decision not to offer it." Pressed for an example, a postal attorney allowed that might include people who live on mountaintops, or behind yards stocked with ferocious dogs.

After a postal judge ruled against him in December, Mr. Girard appealed to U.S. District Court in Seattle, where the case is pending. As for the postal court, he says, "You wonder about the independence of it all."

Historically, postal adjudication focused on enforcing prevailing values. Antebellum Southern postmasters routinely blocked subscriptions to abolitionist newspapers, and 20th-century proceedings were used against those who tried to mail girlie magazines, contraceptives, communist propaganda and photos of prizefights.

Not every case went the government's way. While the film "What Men Go For" depicted "two scantilly clad young ladies, . . . fighting in a bed," Judicial Officer Charles D. Ablard wrote in 1958 that he thought the film was gross, "but 'grossness' is not the test for determining the issues in this proceeding." It wasn't obscene, he ruled, and was entitled to delivery.

On the other hand, Mr. Ablard then ruled that works by Jack Kerouac and William S. Burroughs were "obscene and filthy and thus nonmailable." (Moreover, he complained, the beats wrote "in unintelligible language with very little connection in thought.")

Federal courts soon overturned that order, as well as decisions against Grecian Guild Pictorial and other "body-building" magazines that postal judges had ruled were actually aimed at homosexuals.

After setbacks like those, Mr. Cohen says, postal officials largely abandoned censorship efforts, and consumer protection became the focus of mailability cases. A virility cream that actor Chad Everett pitched in infomercials was ruled nonmailable, as was a Vitamin C product touted as a cure for kidney stones – despite the pleas of Linus Pauling, perhaps the only Nobel laureate to testify before a postal judge. Sweepstakes schemes, mail-order psychics and term-paper mills have run afoul of the postal courts, as did a Tucson, Ariz., animal dealer who tried to ship harmless tarantulas (if they got loose, Mr. Cohen ruled in 1980, "the fear experienced by postal employees could result in personal injury.")

But the most bitter disputes are often those between erstwhile partners over who gets the mail. New York real-estate mogul Abe Hirschfield, for example, not only sought, unsuccessfully, to hire someone to kill ex-partner Stanley Stahl, he also tried to wrest the mail from his estate. Last year, Mr. Cohen reversed a postal judge who had found for Mr. Hirschfeld. "I don't get nothing, I don't get any mail now," grumbles the 81-year-old parking-lot king, now serving one to three years for criminal solicitation in the murder plot.

[Picture Omitted In Printing]

Then there's the war over Wykked Wytch, made even more infernal because Mark Warlokk and Demoness Ipek once were married, under their legal names of Mark and Ipek B. Warnock.

The Turkish-born Ipek says her performance style inspired the band's moniker. "People started saying, 'She's so wicked!' So I thought they should call me the Wykked Wytch," she says. Mr. Warlokk and the others quit the band, she maintains, because "they didn't like the attention I was getting."

More important for the postal litigation, "I opened the post-office box, under my name, and I paid for it faithfully for the past eight years," she says. "It was $7 a year, plus $1 for the key if you lose it."

Ipek presented those receipts to the postal court, along with a sworn statement urging the judge to make sure "this impostor does not have access to my mail."

Mr. Warlokk retorts that he concocted the Wytch concept after hiring Ipek in 1989. "It could have worked, the whole gothic thing," he says, except that Ipek turned out to be "a real prima donna type."

After the split, "we didn't want to switch the P.O. box number, because if you're a potential customer, it looks shady," Mr. Warlokk says. In a letter, he told the postal court that Ipek was merely a "disgruntled employee," and attached statements from the other musicians attesting that Mr. Warlokk founded the group.

Chief Administrative Law Judge Bruce R. Houston found neither party persuasive. And though mail-dispute doctrine relies on "intent of the senders," Mr. Houston couldn't discern whom Wykked Wytch's correspondents really would prefer to open their mail. So, largely because Ipek submitted a sworn statement – and Mr. Warlokk did not – Mr. Houston ruled for the Demoness.

Today, with a new backup band, she continues to perform as Wykked Wytch. Her group has a spot at next month's Milwaukee Metalfest XV and a new album, "Angelic Vengeance," in the works. It's about "a female Christ who basically comes back and gets even with her enemies," Ipek explains.

Mr. Warlokk, cut off from the Wytch's mail, complains that he had to start from scratch. His new band calls itself Carnivean – named, he says, for a demon who assaults witches ("it's actually a stab back at" Ipek, he admits).

Regarding Carnivean's new P.O. box in Salford, Pa., he says, "we decided to go to a lawyer and have a contract written up" so there's no confusion should another mail dispute arise.

APPENDIX EE

General Delivery and Firm Holdout D930.2.3D

D900 Other Delivery Services

D930 General Delivery and Firm Holdout

Service Restrictions

1.2 General delivery is available at only one facility under the administration of a multifacility post office. A postmaster may refuse or restrict general delivery:

a. To a customer who is unable to present suitable identification.

b. To a customer whose mail volume or service level (e.g., mail accumulation) cannot reasonably be accommodated.

(2)

Supreme Court, U.S.
FILED
MAY 20 2005
OFFICE OF THE CLERK

No. 04-1115

In the Supreme Court of the United States

SEATTLE HOUSING AND RESOURCE EFFORT,
PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Postal Service's restrictions on the availability of general delivery service and no-fee boxes violate the First Amendment rights of homeless individuals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 379 F.3d 716. The opinion of the district court (Pet. App. 36-54) is reported at 190 F. Supp. 2d 1221.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2004. A petition for rehearing was denied on November 17, 2004 (Pet. App. 57-58). The petition for a writ of certiorari was filed on February 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Carl Currier, David Bar, and Willard Johnson are three homeless men who live in Seattle, Washington. Pet.

App. 2-3. In May and June of 2000, they sought from the United States Postal Service either no-fee boxes or general delivery at local postal facilities. *Id.* at 3. Under then-existing postal regulations, persons ineligible for carrier delivery service could obtain no-fee postal boxes. See Domestic Mail Manual (DMM) D910.5.1(a) (Issue 55, Jan. 10, 2000). Because of increased security concerns, those regulations were subsequently revised to require persons seeking a no-fee box to have a physical address. Pet. App. 20; see DMM D910.5.2 (Issue 57, June 30, 2002). General delivery allows a person to receive mail addressed to his or her name, with the designation "General Delivery, [City Name]." Pet. App. 3. Mail is held for 30 days for pick-up by the addressee. DMM D930.1.4. In a city with multiple postal facilities, general delivery is provided only at a single location. DMM D930.1.2.

The Postal service informed Currier, Bar, and Johnson that they were ineligible for no-fee postal boxes and that they could receive general delivery only at the Main Post Office in downtown Seattle. Pet. App. 4. With the assistance of Seattle Housing and Resource Effort (petitioner), a homeless-advocacy group, Currier, Bar, and a third homeless person, James Kerns, filed an administrative challenge to the denial of those services. *Ibid.* An Administrative Law Judge held that the services were properly denied. *Id.* at 59-74. In the absence of any administrative appeal, that decision became the final decision of the Postal Service. *Id.* at 75.

Petitioner and the three individual homeless persons then filed suit against the Postal Service in the United States District Court for the Western District of Washington, alleging *inter alia*, that the denial of no-fee boxes and general delivery at locations other than the Main Post Office violated the First Amendment rights of homeless per-

sons. The district court rejected that First Amendment claim. The court reasoned that the Postal Service's policies concerning no-fee boxes and general delivery are content-neutral and reasonably advance the statutory goals of efficient and economical mail delivery. Pet. App. 49-51.

3. The court of appeals affirmed. Pet. App. 1-35. The court applied forum analysis to resolve petitioner's First Amendment claim. As the court explained, under forum analysis, a court first identifies the relevant forum; it then decides whether the forum is public or nonpublic; and it then applies the level scrutiny that is dictated by the nature of the forum. *Id.* at 13.

Applying that analysis, the court first held that the relevant forum for petitioner's challenge to the Postal Service's restriction on general delivery is the general delivery mail service, rather than the mail system as a whole. Pet. App. 14. The court reasoned that the relevant forum is the one to which a speaker seeks access, and the homeless persons here seek access to the general delivery mail system, rather than to the mail system as a whole. *Ibid.*

The court next held that the general delivery mail service is a nonpublic forum. The court concluded that the general delivery mail service "lacks the hallowed history as a crucible of unfettered public debate necessary to establish traditional public forum status." Pet. App. 17. The court also concluded that the general delivery mail service is not a limited public forum, because the Postal Service intends for that service to facilitate temporary mail delivery to a limited class of postal customers, not to serve as a public forum for the exchange of a wide range of views. *Id.* at 17-18.

Applying the "reasonableness standard" applicable to restrictions on access to a nonpublic forum, the court of appeals held that the Postal Service policy of limiting gen-

eral delivery to a single location is consistent with the First Amendment because it is content-neutral and is reasonable in light of the Postal Service's resource and efficiency concerns. Pet. App. 19. Noting that it was presented only with a facial challenge, the court expressed "no opinion regarding whether relief might be appropriate upon an individual plaintiff's affirmative demonstration that the regulation as applied to his individual circumstances effectively bars him from receiving mail at the sole general delivery location." *Id.* at 19-20 n.9.

The court of appeals also rejected the First Amendment challenge to the Postal Service's no-fee box policy. Pet. App. 20-21. Viewing such boxes as nonpublic fora, the court concluded that the restrictions on their availability are both content-neutral and reasonable in light of the Postal Service's statutory mandate to provide efficient and economical service. *Ibid.*

Judge Gould concurred in the judgment, but dissented from some of the court's reasoning. Pet. App. 24-35. Viewing the relevant forum as the entire mail system, and viewing that forum as a public forum, Judge Gould nonetheless concluded that the policies at issue are facially constitutional. *Id.* at 35. While Judge Gould agreed that this case involved only a facial challenge, he concluded that the policies would be unconstitutional as applied to homeless persons who "lack an adequate alternative channel of communication if they practically cannot receive general delivery mail at the main post office." *Id.* at 34-35.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly rejected petitioner's challenge to the Postal Service policies at issue in this case. Applying settled principles, the court of appeals correctly held that the general delivery system and no-fee boxes are nonpublic fora and that the Postal Service policies at issue impose reasonable limitations on access to those fora.

a. Petitioner contends (Pet. 17) that the court erred by identifying the relevant fora as the general delivery system and the no-fee boxes, rather than the mail system as a whole. In defining the relevant forum, however, the Court has focused on "the access sought by the speaker." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-801 (1985). Here, petitioner sought access to the general mail delivery system and no-fee boxes. Accordingly, the court correctly identified the general mail delivery system and no-fee boxes, rather than the mail delivery system as a whole, as the relevant fora.

The Court's decision in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), reinforces that conclusion. In that case, the plaintiffs claimed a First Amendment right to deposit unstamped letters in home mail boxes. In rejecting that claim, the Court focused on the letterboxes as the relevant forum, not the mail system as a whole.

Petitioner contends (Pet. 17 & n.17) that *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983), and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), support its view that the mail system as a whole is the relevant forum. Petitioner's reliance on those cases is misplaced. In *Perry*, the Court held that the relevant forum was an internal school mail system, not an individual teacher's mail box, and in *Lehman*, the Court held that the forum was a city's transit advertising program, rather than individual city buses. According to petitioner,

those cases demonstrate that "[w]hen components of a forum are substantially similar and serve the same communicative purpose, * * * the forum [is defined] as the aggregate of the components." Pet. 17. Even if that abstract principle could be derived from those cases, however, it would not assist petitioner. Unlike the teacher mailboxes in *Perry* and the buses in *Lehman*, the various services provided by the Postal Service are not "substantially similar." The Postal Service offers four "modes of delivery"—general delivery, caller service, carrier delivery, and post office box service. 39 C.F.R. Pt. 3001, Subpt. C, App. A § 2010. Each one has different costs and operational demands for the Postal Service. See, *e.g.*, Pet. App. 3-4, 19, 21 (describing general delivery and no-fee postal box service). The aggregation principle that petitioner would derive from *Perry* and *Lehman* is therefore inapposite here.

Petitioner's reliance (Pet. 18) on *Texas* v. *Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995), is also misplaced. In that case, the court held that denying the Ku Klux Klan the opportunity to participate in the State's adopt-a-highway program did not violate the Klan's First Amendment rights. Because the Klan sought access to the adopt-the-highway program, the court held that the relevant forum was that program and not the public highways as a whole. *Id.* at 1078. There is no inconsistency between that decision and the decision in this case. To the contrary, in both cases the courts identified the relevant forum based on the access sought by the plaintiff.

b. Petitioner contends (Pet. 21) that even if the mail system as a whole is not the relevant forum, general delivery and no-fee boxes are public fora. As the court of appeals explained (Pet. App. 17), however, general delivery lacks the history as a forum of unfettered public debate, and the Postal Service has not affirmatively opened it up as

a general forum for public debate. Instead, the Postal Service uses general delivery service "merely to facilitate temporary mail delivery to a limited class of users." *Id.* at 18. Similarly, no-fee boxes are not traditional public fora, and the Postal Service has not opened them up as fora for general public debate. The court of appeals therefore correctly concluded that general delivery and no-fee boxes are nonpublic fora.

Petitioner argues (Pet. 21) that general delivery and no-fee boxes are public fora because they serve a communicative function. Under this Court's cases, however, "the mere fact that an instrumentality is used for the communication of ideas does not make it a public forum." *Cornelius*, 460 U.S. at 49 n.9; see *Greenburgh*, 453 U.S. at 130 n.6. Just as the letterboxes at issue in *Greenburgh* constituted nonpublic fora even though they were used for communicative purposes, the general delivery service and no-fee boxes are also nonpublic fora.

c. The Postal Service's polices easily satisfy the "reasonableness" standard applicable to nonpublic fora. See *Perry*, 460 U.S. at 46. Confining general delivery service to a single location in areas where a post office operates through multiple branches serves the statutory objective of efficient and economical mail delivery. See 39 U.S.C. 403(a) (duty of Postal Service to "provide adequate and efficient postal services at fair and reasonable rates and fees"). Expanding general delivery to all branch post offices in an attempt to allow homeless customers to pick up items addressed to them at the nearest location would impose significant practical difficulties. Many senders of general delivery mail address items with a station or branch name but an incorrect ZIP Code. If general delivery were expanded to all branch offices, the Postal Service would have no way

to determine the intended location for such items. Suppl. Excerpts of Record (SER) 2-3.

Decentralizing general delivery service would also impose additional burdens and costs. Mail items addressed to an individual at "General Delivery" usually cannot be sorted by automated equipment because most of the items lack ZIP Codes. Excerpts of Record (ER) 158-159; SER 29. That service also requires a counter transaction for each delivery. ER 158-159. Centralizing general delivery at a single location in a city also permits economies of scale. If such mail went to all branch post offices, it would overburden those already operating at capacity, especially if the incremental workload did not justify hiring an additional worker. SER 24.

The Seattle Main Post Office receives approximately 500 to 600 first class letters, 250 to 300 larger envelopes and magazines, and 25 parcels per week addressed to individuals at "General Delivery." SER 29. For two or three days at the beginning of each month, the letter volume doubles (as a result of government benefit checks). *Ibid.* Approximately 80 to 100 persons per day call for general delivery mail at that facility. *Ibid.* The tasks of sorting that incoming mail, serving those customers, and returning unclaimed items require a full-time clerk. *Ibid.* Dispersing those tasks to all 32 geographically separate stations that are part of the Seattle Post Office would require significant additional resources (SER 22), and the costs would be much magnified if such expanded service were to be made available in cities nationwide.

Petitioner contends (Pet. 24-25) that the government may not legitimately take into account such burdens and costs. In support of that contention, petitioner relies on three Ninth Circuit decisions that invalidated restrictions on prisoners' ability to receive bulk mail. Those cases, how-

ever, did not reject administrative burdens and budgetary impacts as legitimate considerations. In two of the cases, the court struck down the limitations at issue as arbitrary because the record did not establish any basis for distinguishing the prohibited categories of mail from permitted categories. *Prison Legal News* v. *Lehman*, 397 F.3d 692, 700 (9th Cir. 2005); *Morrison* v. *Hall*, 261 F.3d 896, 903-904 (9th Cir. 2001). In the third case, the court held that the record failed to show that the restriction relieved any significant burden on staff resources. *Prison Legal News* v. *Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001). Here, the record contains substantial evidence supporting the Postal Service's conclusion that expanding general delivery would impose significant burdens and costs. The decisions relied on by petitioner are therefore inapposite here.

For similar reasons, the Postal Service's policies concerning no-fee boxes satisfy the reasonableness standard. The costs of providing no-fee boxes to all homeless persons would be substantial, Pet. App. 21, and the Court has squarely rejected the notion "that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 546 (1993) (internal quotation marks and citation omitted).

2. Review is also unwarranted in this case because petitioner's contention that the Postal Service's policies violate the rights of all homeless persons as a class could not succeed even if the relevant forum were the mail system as a whole and the mail system were viewed as a public forum. In that event, the Postal Service's policies would have to satisfy the standards for time, place, and manner restrictions. They would have to (1) be "justified without reference to the content of the regulated speech," (2) be "narrowly tailored to serve a significant governmental interest,"

and (3) "leave open ample alternative channels for communication of the information." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Postal Service polices satisfy that standard as applied to homeless persons as a class. As Judge Gould explained in his concurring and dissenting opinion, the Postal Service policies are content neutral, they significantly further the legitimate interest in keeping costs down, and there has been no showing that all homeless persons as a class lack adequate means for receiving their mail. Pet. App. 31-35.

3. Review is also unwarranted in this case because of the limited nature of the court of appeals' decision. The court in this case addressed only petitioner's contention that the Postal Service's general delivery and no-fee box policies violate the First Amendment rights of all homeless persons as a class, without regard to whether such persons have adequate means of receiving mail. The court expressed "no opinion regarding whether relief might be appropriate upon an individual plaintiff's affirmative demonstration that the regulation as applied to his individual circumstances effectively bars him from receiving mail at the sole general delivery location." Pet. App. 19-20 n.9. Because the court correctly resolved the broad-based attack launched by the individual plaintiffs and petitioner, and left open as-applied challenges by persons who could make a showing that the Postal Service's policies preclude them from receiving their mail, review by this Court is clearly not warranted.

4. Finally, the individual homeless persons who originally brought this action are no longer parties to the case. The sole petitioner is a homeless advocacy group. There is a substantial question whether that organization has stand-

ing to maintain this action. For that reason as well, review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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